90-148

Supreme Court, U.S.
FILED
MAY 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

MAY TERM, 1990

MAURICE L. KLEIN, APPELLANT

V.

IOWA DEPARTMENT OF REVENUE AND FINANCE,
APPELLEE.

PETITION FOR WRIT OF CERTIORARI

JAMES H. REYNOLDS
ATTORNEY AT LAW
1045 Main Street
Dubuque, IA 52001
(319) 556-1045
COUNSEL OF RECORD

DENNIS J. NAUGHTON
NAUGHTON, STENLUND & REILLY
P.O. Box 696, 1631 Main Street
Dubuque, IA 52004-0696
(319) 556-8831
COUNSEL FOR APPELLANT

QUESTION PRESENTED

I. WHETHER IOWA CODE SECTION 422.9(4) IS REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES TO THE EXTENT THAT IT REQUIRES A MARRIED TAXPAYER FILING A SEPARATE RETURN TO USE THE STANDARD DEDUCTION IF HIS OR HER SPOUSE ELECTS TO DO SO.

II. WHETHER IOWA CODE SECTION 422.9(4) IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES TO THE EXTENT THAT IT REQUIRES A MARRIED TAXPAYER FILING A SEPARATE RETURN TO USE THE STANDARD DEDUCTION IF HIS OR HER SPOUSE ELECTS TO DO SO.

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions involved ... 3

Statement 4

Conclusion 21

Appendices:

A. Claim for Income Tax Refund Filed August 16, 1984, with the Iowa Department of Revenue 24

B. Proposed Order of Linda Erickson, Hearing Officer, Filed July 31, 1987, with the Iowa Department of Revenue and Finance 31

C. Notice of Appeal to the Director of the Iowa Department of Revenue and Finance served August 25, 1987 54

D. Order of Director upon Review of Hearing Officer's Proposed Order entered December 2, 1987 62

E. Petition for Judicial Review to the Iowa District Court For Dubuque County Filed December 29, 1987 65

F. Judgment and Decree entered in the Iowa

District Court for Dubuque County on October 13, 1988 74

G. Motion to Amend or Enlarge Findings or Conclusions filed in the Iowa District Court for Dubuque County on October 28, 1988 77

H. Judgment and Decree entered in the Iowa District Court for Dubuque County Filed November 10, 1988 80

I. Decision of the Iowa Supreme Court filed February 21, 1990 83

TABLE OF AUTHORITIES

Cases:

Association of Civilian Technicians, Montana Air Chapter v. Federal Labor Relations Authority, 756 F.2d 172, 244 U.S. App. D.C. 151 (C.A.D.C. 1985) 15

Bonilla v. Rodriguez, 635 F.Supp. 148 (D. Puerto Rico 1986) 16

Califano v. Webster, 430 U.S. 313, 51 L.Ed.2d 360, 97 S.Ct. 1192 (1977) 17

Evanston Ins. Co., Inc. v. Merin, 598 F. Supp. 1290 (D.C.N.J. 1984) 18

General Electric Co. v. Gilbert, 429 U.S. 125, 50 L.Ed.2d 343, 97 S.Ct. 401 (1976) 17

Grossling v. Ford Memorial Hosp., 614 F.Supp. 1051 (D.C.Tex. 1985) 19

Heritage Cablevision v. Board of Supervisors, 436 N.W.2d 37, 38 (Iowa 1989) 14

Hoffman v. U.S., 767 F.2d 1431 (C.A. 9(Cal.) 1985) 15

In Re Lara, 731 F.2d 1455 (C.A. Cal. 1984) 15

Jackson Water Works, Inc. v. Public Utilities Com'n of State of Cal., 793 F.2d 1090, certiorari denied 107 S.Ct. 1334, 94 L.Ed.2d 1984 14

Jenkins v. State of Mo., 593 F.Supp. 1485 (D.C. Mo., 1984) 17

Madden v. Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590, 593 (1940) 14

Martin v. International Olympic Committee, 740 F.2d 670 (C.A.Cal. 1984) 15

Orr v. Orr, 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102 (1979). 17

Personnel Adm'r. of Mass. v. Feeney, 442 U.S. 256, 60 L.Ed.2d 870, 99 S.Ct. 2282 (1979). 18

Railway Express Agency v. New York, 336 U.S. 106, 111-13 (1949) 12

Russell v. Salve Regina College, 649 F.Supp. 391 D.R.I. 1986) 20

Constitution, statutes, and regulations:

Constitution of the United States, Fifth Amendment 3

Constitution of the United States, Fourteenth Amend. 3

Internal Revenue Code, 1954, Section 142 7

Iowa Code, Section 422.9 3,8

Iowa Rules of Court, Section 63(c)(6) 13

Iowa Rules of Court, Section 152(3). 13

Miscellaneous:

Hafen, Bruce C., "The Constitutional Status of Marriage, Kinship and Sexual Privacy", 81 Mich. L. Rev. 463 (Jan., 1983) 7,8,9,10

Newhouse, Wade J. Jr., "Constitutional Uniformity and Equality in State Taxation, Michigan Legal Studies, 1959 11

IN THE SUPREME COURT OF THE UNITED STATES

MAY TERM, 1990

NO.

MAURICE L. KLEIN, APPELLANT

V.

IOWA DEPARTMENT OF REVENUE AND FINANCE, APPELLEE.

PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

James H. Reynolds, on behalf of Maurice L. Klein, petitions for Writ of Certiorari to review the Opinion of the Iowa Supreme Court filed February 21, 1990.

OPINIONS BELOW

The opinion of the Iowa Supreme Court (App. I, infra) is reported at 451 N.W.2d 837. The opinion of the Iowa District Court for Dubuque County dated November 10, 1988, (App. H., Infra) is not reported. The opinion of the Iowa District Court for Dubuque County dated October 13, 1988, (App. F., infra) is not reported. The opinion of Director Upon Review of Hearing Officer's Proposed Order

(App. D, infra) is not reported. The opinion of Linda Erickson, Hearing Officer, Department of Revenue and Finance (App. B, infra) is not reported.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

The Judgment of the Iowa Supreme Court was entered February 21, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens * * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Iowa Code Section 422.9 provides in relevant part:
* * * there shall be deducted from net income the larger of the following amounts:
1. An optional standard deduction, after deduction of federal tax, * * * for a married person who files separately * * *.

STATEMENT

Appellant Maurice Klein (hereafter Klein) filed a 1981 Iowa state income tax return in April, 1982. The tax return filing status was "married filing separately on a combined return" and showed a refund of $220.10. A 1982 Iowa State income tax

return was timely filed showing a filing status of "married filing separate return" and requested a refund in the amount of $337.93. In November of 1983, Klein was told by an employee of Appellee Iowa Department of Revenue and Finance (hereafter the Department) that he could change his filing status by filing an amended return and Klein filed that amended Iowa return in December of 1983 with the only change being the filing status to "married filing separate return" and requested an additional refund of $103.76.

On April 16, 1984, the Department notified Klein that the refund on the 1981 tax return was denied, stating, "Mrs. Klein must also amend to use filing status no. 4" and notice was given as to the protest procedure.

On April 23, 1984, Klein received an audit notice which stated that he must take the standard deduction because his spouse took a standard deduction for tax year 1982 and denied his dependency deduction. Klein received a tax due notice requesting payment in the amount of $773.84.

Klein received a subsequent notice of tax due in the amount of $794.60. Klein paid the amount under protest on May 23, 1984, and subsequently sent a Claim for Income Tax Refund/Protest to the Department on July 16, 1984. The Protest was docketed as No. 84-240-2C-RC on July 18, 1984.

On August 8, 1984, Klein filed an amendment to his July 16, 1984 Protest and on August 15, 1984,

he filed a Claim for Income Tax Refund/Protest with regard to the 1982 tax return and it was docketed as No. 84-267-2C-RC. An Amendment to the Protest regarding the 1982 tax return was filed September 5, 1984. The Department answered the original Protest filed in both cases on August 29, 1985.

On July 29, 1986, an evidentiary hearing was held before Hearing Officer Erickson at which time Klein presented evidence and numerous exhibits and the State Department of Revenue presented no evidence. The Department filed a brief on August 29, 1986. Klein filed a Brief and Argument on September 30, 1986. On October 29, 1986 a Reply Brief was filed by the Department. Klein's Reply Brief was filed on October 29, 1986.

A Proposed Order was entered by Linda Erickson, Hearing Officer, Iowa Department of Revenue and Finance on July 31, 1987. Klein appealed to the Director of the Department on August 25, 1987 and an Order of Director Upon Review of Hearing Officer's Proposed Order was entered by G. D. Bair, Director, Iowa Department of Revenue and Finance on December 2, 1987.

Klein filed a Petition for Judicial Review in the Iowa District Court for Dubuque County on December 29, 1987.

Klein filed a Brief in the District Court on August 31, 1988. The Department filed a Brief in the District Court on September 9, 1988. A Judgment and Decree was entered on October 13, 1988.

Klein filed a Motion to Amend or Enlarge Findings and Conclusions on October 28, 1988. A second Judgment and Decree was entered on November 10, 1988.

An Iowa Supreme Court decision was entered on February 21, 1990. It was held in part as follows: No suspect classification or fundamental right is involved here, so our standard of review is rationality. Under this standard we must sustain the validity of a statute

> "If the legislature could have reasonably concluded that the challenged classification would promoted a legitimate state purpose." He must demonstrate beyond a reasonable doubt that the statute violates equal protection guarantees. To sustain this burden he has to negate every reasonable basis that may support the statute. In deciding whether Maurice has carried this burden we must keep in mind that "[a]n iron rule of equal taxation is neither attainable nor necessary."

City of Waterloo v. Selden, 251 N.W.2d 506, 508-09 (Iowa 1977). We agree with the department that Maurice has not carried his burden. ... the statute treats married persons as one economic unit for purposes of the deduction and second, ... Section 422.9(4) prevents a drain on tax revenues while at the same time preserving a deduction for each spouse in case of a dispute. The Court also held that Klein's due process challenge has no merit.

REASONS FOR GRANTING THE PETITION

The Iowa Supreme Court, in adopting the "rational basis" test for analysis of the Iowa statute in question first concluded that since the statute treats marriage as an economic unit, the legislature could have rationally believed that the economics of marriage justified such treatment.

However, a look at the history of the law exhibits the illogic embraced in that approach. The Iowa statute requiring a spouse to use the standard deduction if the other spouse elected to do so came into existence in 1955 and was never changed.

At the time of the enactment of the Iowa statute, Section 142 of the Internal Revenue Code of 1954 provided:

> **Section 1421. Individuals not eligible for standard deduction.**
>
> (a) **Husband and wife.**--The standard deduction shall not be allowed to a husband or wife if the tax of the other spouse is determined under section 1 on the basis of the taxable income computed without regard to the standard deduction.

The Regulations of the Department of Revenue implementing Section 142, as were in effect prior to March 1, 1960, provided, inter alia, "(b) If each spouse files a separate Form 1040, both must elect to take the standard deduction or both are denied the standard deduction."

By time of the filing of the 1982 income tax return of the Petitioner, the I.R.S. required a taxpayer to itemize deductions if married, filing a separate return, and his or her spouse itemized. Thus, at the time of the filing of the return at issue herein the Iowa was directly the opposite of the Federal law.

Much has changed since the initial passage of Section 422.9 of the Iowa Code. First of all, separation and divorce, though existent, were not as as prevalent in 1955 as in 1982. This increase has been partly the result of and partly facilitated by the adoption of more liberal divorce laws adopted by the states.
Iowa's no fault dissolution of marriage statute took effect in 1970, and, in general, the dissolution of marriage rate has continued to increase since then. This divorce reform has now created in some states the practical right of unilateral marriage termination, wherein the interests of the marital partner and of children are likely to receive reduced levels of consideration. Bruce C. Hafen, "The Constitutional Status of Marriage, Kinship and Sexual Privacy", 81 Mich. L. Rev. 463, at 567 (January 1983).

What bears further study, than the Iowa Supreme Court was willing to undertake, is the evolutionary impact of the recent growth of interests that compete with marriage and which might be regarded by some as a threat to the continued existence of marriage as a preferred status under the constitution. Because of the

increasing role of the individual as a single parent and in other single roles, the recognition of advancing important policy interests of individuals deserving legal and constitutional protection have developed, despite the conflict between those interests and the historical policy of the courts favoring formal family ties. As a result of the increased recognition of such interests, the policy preference for marriage over the rights of the individual has inevitably appeared to diminish in the eyes of the court.

It has been recognized by some writers that even though the constitutionally "protected status of marriage and kinship still remains in a uniquely favored position, marriage cannot realistically be expected to take such priority that all competing interests must forever go unrecognized, and this even though society continues to recognize marriage as the "foundation of society". These writers assert that if the protected status of marriage were always given preference, many just claims would remain unsatisfied. See discussion in Hafen, "The Constitutional Status of Marriage, Kinship, and Sexual Privacy", supra, at pages 561 - 569.

This Petition does not seek to contest the legitimacy of the premise that marriage deserves favored status in the tax law in general, but, instead, what is questioned here is the assumption relied on by the Iowa Supreme Court, without resort to the legislative history or to any other legal or factual source, that the economics of marriage justified the treatment of married

persons as one economic unit for the purposes of the standard deduction election, thereby delegating to Mr. Klein's wife, from whom he was separated the right and authority on behalf of the state to determine the manner of computing the taxes he was to pay the state and the amount thereof.

Admittedly, the Federal rule requiring both to itemize if one does has somewhat the reverse effect. However, the evidence submitted in the administrative hearing in this case shows that the effect on Mr. Klein's wife, had she been required to claim her share of the itemized deductions as the Federal law requires, would have been negligible and in fact may have provided her tax return with the same result as the standard deduction would have.

Petitioner asserts that in today's society it is not necessarily rational in today's society to believe that the economics of marriage justify the treatment of married persons as one economic unit for the purposes of personal tax deductions. As was mentioned by Bruce C. Hafen, supra, at 81 Mich. L. Rev. pages 563 -574, the role of contract between individuals has been slowly replacing that of status in the marriage and family as the unit of which civil laws take into account.

While much of Iowa law has continued to evolve as society did, its rule requiring the standard deduction remained static as the cost of supporting a family and a household steadily increased, making the burden on the spouse who was forced by the law to forego itemization of

deductions greater and greater as the years have gone by. Hence, while the single economic family unit principle may have been at one time a rational basis for requiring the standard deduction, this principle is less and less applicable in the two earner families and in a society where the existence of separation in marriage far exceeds the bounds of the imagination of the original drafters of the law.

Indeed, the comments of Wade J. Newhouse Jr., in his treatise, Constitutional Uniformity and Equality in State Taxation, Michigan Legal Studies, 1959, at page 763 are relevant to the problem faced by Maurice Klein in the unfair impact of the Iowa statute. In discussing uniformity clauses in the constitutional implementation of the law and the task of constitutional interpretation of that law, Mr. Newhouse said:

". . . the courts were saddled with interpreting and applying clauses conceived at a time when the nation's economy, and consequently it's revenue structure was relatively simple. . . . However, as the economy grew more complex, as demands for state services increased, attempts to reach all the wealth of society in order to spread fairly the tax burden taxed the ingenuity of the tax-makers, and taxes no longer in fact fell into the simple property-nonproperty division. Yet, in determining the validity of new experiments in taxes, the courts had to continue to apply the constitutional limitations conceived for a different economy. . . ."

To the extent that the Iowa Supreme Court arbitrarily relied upon a basis for the continued application and enforcement of the Iowa law requiring the standard deduction for separated married persons in the status of Maurice Klein, it's ruling is erroneous and repugnant to the equal treatment which is required under the Fifth Amendment of the Constitution. Contrary to the reasons stated by the Iowa Supreme Court as justification for the continued existence and enforcement of the law, is no longer rational or sound in today's society.

While this law was not intended to treat married men taxpayers as a special class to suffer the detrimental effect of the rule, the impact of the law as uniformly since its inception more detrimentally affected married men than any other class. This should be unacceptable when other methods of accomplishing the state's purposes are available, particularly where, as in this instance, there appears to be no reason why the statute was not revised to better conform to today's societal structure or the current Federal tax law, except that it was merely ignored.

When there appears to be no useful reason for the unequal treatment, courts can take no better measure to assure that laws will be just than to require that the laws be equal in operation. Railway Express Agency v. New York, 336 U.S. 106, 111-13 (1949) (Jackson, J., concurring).

The Iowa Supreme Court also found that Section 422.9(4) of the Iowa Code serves a legitimate

state purpose, that being to prevent the doubling-up of deductions by married couples. It is here that the illogic of the Iowa Court reached its pinnacle. The Iowa Court opined that without the provision requiring the standard deduction of both spouses one spouse would be allowed to take all the itemized deductions and the other the standard deduction. Opinion page 14.

It should be noted that the court, in reference to another issue, at page 12 of the Opinion, mentioning I.R. C. section 152(3) and Note, Children of Dissolved Marriages: A Disputed Tax Deduction, 4 Sw. U.L. Rev. 101, 102 (1972), suggested that the legislature ought to impose an obligation upon the custodial parent to furnish the department with proof of total support and permit the department to furnish that information to the noncustodial parent. Petitioner suggests that the same kind of interspousal reporting, accounting and apportionment could easily be required as to tax deductions and in fact is already in place in many states and, of course, in the Federal law and regulations, which provide that the standard deduction is unavailable for a married individual who files a separate return if the spouse itemizes. I.R.C. Section 63(c)(6).

What is important for tax purposes is that there be uniformity between spouses in the filing of their returns and that neither of them take more than their share of the deductions or the deductions he or she actually incurred. There are so many ways to secure this purpose without the invasive effect of the Iowa statute. The

additional threat of potential audit of the returns of both husband and wife should serve as an additional security blanket to assure the voluntary compliance with the rules by married taxpayers, especially in this day of computers at a time when it is required to provide the other spouse's name and social security number on the return. See Form 1040, U.S. Individual Income Tax Return 1989, line 3.

The classification objected to here is the that the negative impact of the statute in question falls arbitrarily more often on men, who earn more on the average and therefore obtain more benefit from itemizing deductions. See Opinion page 12.

Accordingly, the damage suffered in Iowa generally occurs to married male taxpayers who file separate returns.

This court has held, as the Iowa Supreme Court pointed out, that in the equal protection context, if the state's statute could rationally be concluded to have a legitimate state purpose, the statute will be sustained unless the classification is hostile and oppressive discrimination against particular persons and classes. Citing Heritage Cablevision v. Board of Supervisors, 436 N.W.2d 37,38 (Iowa 1989), (quoting Madden v. Kentucky, 309 U.S. 8;3, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590, 593 (1940)).

But in order for the statute to be upheld, the "basis", to be "rational", must be "plausible", "arguable", or "conceivable". Jackson Water Works,

Inc. v. Public Utilities Com'n of State of Cal., 793 F. 2d 1090 , certiorari denied 107 S.Ct. 1334, 94 L.Ed. 2d 184.

It should not be enough for the statute to have once been plausible when the only current explanation for its function is to allow the state to compute the taxpayer's income at a higher level, resulting in more tax, based solely on an election the state legislature has improperly delegated to the other spouse. Absent a legitimate argument that other more uniformly enforceable schemes are unavailable, the existing Iowa approach does not seem rational.

The criteria set forth by this court and reiterated by the Federal Courts of Appeals, as well as the state courts, simply provide that an otherwise discriminatory statute will be justified where there is a compelling societal interest, Martin v. International Olympic Committee, 740 F. 2d 670 (C.A. Cal. 1984), where the classification is found to rest on some differentiation fairly related to the object of the regulation, In re Lara, 731 F.2d 1455 (C.A. Cal. 1984), where the statute neither burdens fundamental rights nor employs suspect criteria, Association of Civilian Technicians, Montana Air Chapter v. Federal Labor Relations Authority, 756 F. 2d 172, 244 U.S. App. D.C. 151 (C.A.D.C. 1985) or where the state is deemed by the state to be vested with latitude to account for limitations on its practical ability to remedy the ills of the statute. Hoffman v. U. S., 767; F. 2d 1431 (C.A. 9(Cal.)1985).

However, when the primary impact of the statute is to allow one spouse to subject the other spouse to a higher tax bill, sometimes maliciously in the emotionally charge divorce arena, there cannot be said with a straight face to exist a compelling societal interest in that purpose or result. Nor would that seem to be a legitimate object of governmental regulation. And as far as "suspect criteria" go, taking sides in a divorce at the expense of the more productive spouse arguably suspect for sure.

In this regard, the Equal Protection clause requires that a state not purposefully discriminate against those who are entitled to be treated in the same manner as other similarly situated persons. Bonilla v. Rodriguez, 635 F. Supp. 148 (D. Puerto Rico 1986). In this case spouses should be treated equally.

The Iowa Court found that the statute did not specifically set up husbands as a separate class, but the statute clearly deals only with husbands and wives, and husbands have historically earned more money than wives and have historically used the itemized deduction method more than wives. Opinion, page 12.

With that knowledge, (Petitioner's statistical evidence came from the records of the Defendant, Iowa Department of Revenue), the department, as decision maker in this case, selected and reaffirmed the particular course of action at least in part because of, not merely in spite of, its adverse effects upon married separated husbands,

an identifiable group. Jenkins v. State of Mo., 593 F. Supp. 1485 (D.C.Mo 1984).

For the purposes of equal protection principles in the area of statutory classifications by gender, the mere recitation of a benign, compensatory purpose is not an automatic shield that protects against any inquiry into the actual purposes underlying the legislative scheme. Califano v. Webster, 430 U.S. 313, 51 L.Ed.2d 360, 97 S.Ct. 1192 (1977).

A distinction which on its face is not sex related may nonetheless violate the equal protection clause of the Fourteenth Amendment if it is in fact a subterfuge to accomplish a forbidden discrimination. General Electric Co. v. Gilbert, 429 U.S. 125, 50 L.Ed.2d 343, 97 S.Ct. 401 (1976).

A state statutory scheme providing that different treatments be accorded on the basis of sex establishes a classification subject to scrutiny under the equal protection clause of the Fourteenth Amendment, and the fact that it expressly discriminates against men rather than women does not protect it from scrutiny. To withstand scrutiny under the equal protection clause of the Fourteenth Amendment, classifications by gender must serve **Important** (emphasis added) governmental objectives and must be substantially related to the achievement of the those objectives. Orr v. Orr, 440 U.S. 268, 59 L.Ed.2d 306, 99 S.Ct. 1102 (1979).

For the purposes of equal protection, when a statute gender- neutral on its face is challenged on the ground that its effects upon women were disproportionately adverse, a two fold inquiry is appropriate: the first question is whether the statutory classification is indeed neutral in the sense that it is not gender based; if the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination, and in the second inquiry, impact provides an important starting point, although purposeful discrimination is the condition that offends the United States Constitution. Personnel Adm'r. of Mass. v. Feeney, 442 U.S. 256, 60 L.Ed.2d 870, 99 S.Ct. 2282 (1979).

The Iowa Supreme Court failed to look at impact and, in fact, ignored the complaint of the male taxpayer in this case, though admitting that the impact was discriminatory. The Court also failed to inquire into whether the statute was neutral in an instance such as this where one taxpayer has the right to make elections for the other taxpayer, which may be based on less than objective motives.

Finally, and most importantly, delegation by a state legislature of unchecked legislative power to a private entity can amount to a violation of the due process and equal protection of the Fourteenth Amendment. Evanston Ins. Co., Inc. v. Merin, 598 F. Supp. 1290 (D.C.N.J. 1984).

That's exactly what the state of Iowa did in granting the standard deduction election to the other spouse in a divorce or separation situation. Considering the emotional trauma accompanying many divorces or separations, the granting by the state of this kind of power to a spouse from one is separated is patently incidious on its face.

A Federal court in Texas has considered the coercive impact of a private entity exercising state regulatory power over another, in this case the wife holding a right by election to increase the tax burden of the husband, thus playing a role in the taxing power of the state. It was held that if a private entity exercises powers that are traditionally the exclusive prerogative of the state, the state action requirement, for due process and equal protection purposes, is satisfied. The court said further:

> "For due process or equal protection purposes, a plaintiff may show that there is a sufficiently close nexus between regulations imposed by a state and the challenged action of a regulated entity so that action of the latter may fairly be attributed to the state."
>
> "A plaintiff may prove state action by showing that the state exercised coercive power or provided significant overt or covert encouragement to induce the challenged private action. . . ." Grossling v. Ford Memorial Hosp., 614 F. Supp. 1051 (D.C.Tex. 1985).

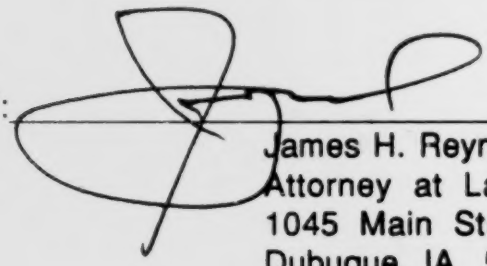
In this case it is not the private action of the spouse that is challenged, but its effect on this taxpayer. The overt act on the part of the state of Iowa, through its revenue department, which induced the other spouse to make the election was the statute.

The have been other cases where government involvement in what could be a private vendetta has been held discriminatory. In Russell v. Salve Regina College, 649 F. Supp. 391 (D.R.I. 1986) a Federal District Court in Rhode Island held that when a web of interconnection between government and private bigotry is spun tightly enough to conclude that a government agency has insinuated itself into a position of interdependence with a discriminatory actor, then the challenged conduct is subject is subject to Constitutional (Fifth or Fourteenth Amendment) scrutiny.

CONCLUSION

Therefore, to better protect all taxpayers of the state of Iowa who file separate returns from emotionally motivated elections and unequal treatment this Court should review and clarify the rights of taxpayers and those similarly situated.

RESPECTFULLY SUBMITTED,

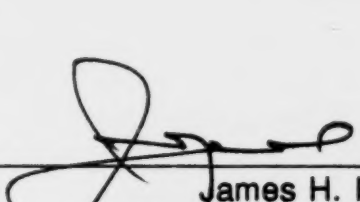
BY: 

James H. Reynolds
Attorney at Law
1045 Main Street
Dubuque, IA 52001
(319) 556-1045
Counsel for Appellant of Record

Dennis J. Naughton
Naughton, Stenlund & Reilly
P.O. Box 696, 1631 Main Street
Dubuque, IA 52004-0696
(319) 556-8831
Council for Appellant

CERTIFICATE OF FILING

I, James H. Reynolds, hereby certify that I will file the attached Petition for Writ of Certiorari by depositing 40 copies thereof in the United States mail on the 22nd day of May, 1990, addressed to the Clerk of the Supreme Court of the United States, One First Street NE, Washington, D.C. 20543.

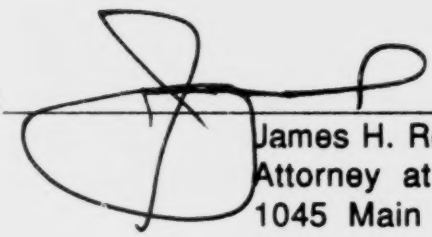
BY: 

James H. Reynolds
Attorney at Law
1045 Main Street
Dubuque, IA 52001
(319) 556-1045

COUNSEL FOR APPELLANT OF RECORDCERTIFICATE OF SERVICE

I, James H. Reynolds, hereby certify that on the 22nd day of May, 1990, I served the attached Petition for Writ of Certiorari by mailing three copies thereof to:

Thomas J. Miller
Harry M. Griger
Lucille M. Hardy
Office of the Attorney General
Hoover State Office Building
Des Moines, IA 50319.

BY: 

James H. Reynolds
Attorney at Law
1045 Main Street
Dubuque, IA 52001
(319) 556-8831

APPENDIX A

BEFORE THE IOWA STATE DEPARTMENT OF REVENUE
HOOVER STATE OFFICE BUILDING DES MOINES, IOWA

IN THE MATTER OF
MAURICE L. KLEIN
4706 Melody Circle,
Dubuque, IA 52001
Social Security NO.
482-62-8119.
DOCKET NO. _____
CLAIM FOR INCOME TAX REFUND
PROTEST

COMES NOW Maurice L. Klein, by and through his attorney, Dennis J. Naughton, of Dubuque, Iowa, and respectfully states the following in protest of the denial of an income tax refund for the tax year 1982 pursuant to amended tax return filed by the taxpayer, to-wit:

1. The taxpayer, Maurice L. Klein, is a resident of Dubuque County, Iowa, and heretofore filed a timely income tax return for tax year 1982 with a filing status "married filing separate returns", a copy of which is attached hereto and marked Exhibit "A" and made a part hereof.

2. As a part of said original tax return, taxpayer claimed itemized deductions as he did on his Federal income tax return.

3. His wife at that time, LaVonne M. Klein, Social Security Number 479-64-8421, filed a 1982

income tax return with a filing status "married filing separate return", claiming standard deduction, a copy of which is attached hereto, marked Exhibit "B" and made a part hereof by reference.

4. Thereafter, on or about December 22, 1983, taxpayer above named filed a Federal and State Form 1040X, a copy of the State income tax return Form IA-1040X being attached hereto, marked Exhibit "C" and made a part hereof by reference.

5. The Iowa Department of Revenue denied taxpayer's refund as claimed on the amended return on the grounds that the State would refuse to allow taxpayer to claim the dependents on his income tax return without verification of support, this by audit dated May, 1984.

6. The Iowa Department of Revenue further denied taxpayer's claimed refund by audit dated April, 1984, on the grounds that taxpayer is required under Iowa rules to file a "standard deduction" income tax return if the other spouse did so.

7. As to the position of the State that this taxpayer is required to use the standard deduction because State regulation and the statute, Section 422.9.4. are discriminatory and in violation of Federal law in that they operate uniformly in the treatment of this taxpayer on the following grounds:

a. Said statute denies this taxpayer of the right to claim proper and legal tax deductions in violation of Article I, Section 6 of the Iowa Constitution, thereby depriving him of his right to his property, his rights and to his peace, as well as to equal protection, and further in violation of the Fourteenth Amendment to the United States Constitution.

b. The statute operates in favor of one spouse over the other, in that it favors the lower income spouse. In doing so, it favors the female spouse due to the fact that a majority of female spouses have lower incomes than their husbands, thereby discriminating against the man and the husband.

c. Said statute and rule do not provide uniform treatment of married persons as opposed to single persons and husbands as opposed to wives.

d. Said statute and rule deprive the taxpayer of the tax deduction without substantial corresponding benefit to the other spouse. In this case, the other spouse was required by the use of the standard deduction to pay additional amounts of tax to the Iowa Department of Revenue. This taxpayer believes that if the other spouse had used an itemized deduction income tax return, she would have obtained a better tax benefit due to the many interest payments on the loans she had outstanding at the time as well as to other expenses she incurred.

8. In response to the denial of the right of this taxpayer to claim the dependents claimed on his

income tax return and on the amended return, taxpayer submits the following data, facts and information:

a. From the deposition of taxpayer's former spouse, LaVonne Marie Klein, said deposition being dated May 4, 1983 as part of a dissolution of marriage action in the District Court of Dubuque County, Iowa, excerpts of said deposition are attached hereto as follows:

1) Page 13, line 24 through page 14, line 18 - I do not keep track of groceries. I just pay cash. ..."

2) Page 17, line 19-25 - Her previous husband does not support her children.

3) Page 23, line 7 through page 24, line 25 - Her net income was around $300 every two weeks. She would buy things for the children as needed, amounting to about $20 per week.

4) Page 25, line 3 through page 27, line 25 - The balance of her income was used to pay off her personal loans, her medical insurance, and an occasional item for school about once a year.

5) Page 33, line 13-22 - For five weeks in tax year 1982, she received worker's compensation of about half her normal take home pay, due to an injury.

6) Page 50, line 14 through page 51, line 8 - She cannot prove what she contributed to the support

of the children during the marriage to the taxpayer. She has no records.

b. Exhibit "D" - A comparison of the taxpayer's expenses before and during his marriage to LaVonne Marie Klein.
Taxpayer married LaVonne Klein on November 27, 1981. They courted for a period prior to the marriage. Exhibit "D" shows the increase in the taxpayer's personal and household expense fro the time he began to contribute to, provide for and assume the responsibility for LaVonne Klein and her children.

c. Exhibit "E" - electricity bill comparison between 1981 and 1982. This exhibit shows a increase in this utility expense as a result of having the other spouse's children in his household.

d. Exhibit "F" - gas expense comparison for the same years. This exhibit shows a corresponding increase in the cost of operating the furnace and hot water heater, because of the children being in the home for longer hours, especially during the day, at which times were not expensive for these uses due to the taxpayer's work schedule.

e. Exhibit "G" - A comparison of taxpayer's grocery bills before and during the marriage. Likewise, taxpayer, during the courting period and the marriage incurred a greater expense than for just his own personal expense for these items.

f. Exhibit "H" - actual expense while married. This exhibit shows the total living cost of the taxpayer and his household.

g. Pursuant to Internal Revenue Publication 501 and the Worksheet which is part of said publication, taxpayer
qualifies to claim dependents in question based on the information shown on the attached Exhibit "I". (For purpose of calculating Exhibit "I" the following information should be considered: As shown on Exhibit "G", taxpayer's monthly grocery expenses for the twelve-month period of tax year 1982 are used in a total sum of $1,672.20; the former wife's contribution to groceries in the sum of $240.00 is computed pursuant to her deposition statement on page 15, lines 1517, Financial Affidavit, which Financial Affidavit was filed in the dissolution of marriage of taxpayer and wife, wife alleged to have paid $700.00 per year in clothing. Taxpayer claimed no such expense and claims none here. The medical and dental expenses shown on line 16 were based on medical insurance payments by the wife of $528.00 per year, or $44.00 per month, and dental expenses for Jodi in the sum of $240.00 total, or a total medical and dental expenses of $768.00, all paid by the wife. Taxpayer claims an expense as a household expense of $355.07 for damages to a video recorder caused by the children of the wife. Automobile expenses are calculated from taxpayer's itemized automobile expenses as shown on Exhibit "J" showing actual transportation expenses of taxpayer for year 1982 for a van in the sum of $1,370.28 and an automobile expense

calculated at $250.56 of total transportation expenses of $1,620.84. The wife's expenses are based on the Financial Affidavit filed in her divorce action showing $50.00 per month or $600.00 annual.)

h. In addition, based on a criteria listed in Internal Revenue Publication 501, taxpayer met all of the qualifications and criteria for treating both of the minor children claimed on the tax return as dependents for income tax purposes. Accordingly, there is no reason for denying him the claimed dependency.

ACCORDINGLY, taxpayer reasserts his demand for a refund and requests that the Departmental denial be reversed, that his 1962 income tax return as amended be accepted, that informal procedures be had herein, that he be granted a hearing or conference as to this matter, and such other relief as the Department deems appropriate.

* * *

APPENDIX B

BEFORE THE IOWA DEPARTMENT OF REVENUE AND FINANCE

HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

IN THE MATTER OF

MAURICE L. KLEIN
4706 Melody Circle
Dubuque, IA 52001

PROPOSED ORDER
DOCKET NOS. 84-240-2C-RC
84-267-2C-RC

INCOME TAX REFUND CLAIMS
STATEMENT OF THE CASE

On July 17, 1984, a protest was filed on behalf of Maurice L. Klein (Protestor) to a denial of an Iowa individual income tax refund claim for the year 1981 (docket no. 84-240-2C-RC). On August 10, 1984, the Protestor filed an Amendment to Protest.

On August 16, 1984, the Protestor filed a protest to a denial of an Iowa individual income tax refund claim for the year 1982 (docket no. 84-267-2C-RC). On September 7, 1984, the Protestor filed an Amendment to Protest and Claim for INcome Tax Refund.

On September 10, 1984, the Protestor filed Interrogatories and Request for Production in each case (docket nos. 84-240-2C-RC and 84-267-2C-RC). On November 20, 1984, the Protestor filed an Amendment to Protest in docket no. 84-240-2C-RC. On August 15, 1985, the Protestor filed a Notice of Disagreement with Tax Review Committee's Findings for both cases. On August 29, 1985, the Department of Revenue and Finance (Department) filed an answer in each case and requested a prehearing conference. On October 8, 1985, the Protestor filed a Motion to Compel Discovery.

On October 15, 1985, the Hearing Officer issued a Notice of Prehearing Conference for both cases, scheduling a prehearing conference for January 10, 1986. On October 15, 1985, the Hearing Officer also issued a Notice of Time, Place and Nature of

Hearing, consolidating both cases for hearing and scheduling an evidentiary hearing for February 18, 1986.

On October 25, 1985, the Department filed a Resistance to Motion to Compel Discovery in each case. On October 28, 1985, the Protestor filed a Reply to Resistance to Motion to Compel Discovery for both cases. On November 6, 1985, the Hearing Officer issued a Ruling on Motion to Compel Discovery.

On December 10, 1985, the Protestor filed Interrogatories and Request for Production in each case. On January 6, 1986, the Department filed Department's Answers and Objections to Interrogatories in each case, Department's Response and Objection to Request for Production in docket no. 84-240-2C-RC, and Department's Objection to Request for Production in docket no. 84-267-2C-RC. On January 8, 1986, the Department filed a Certificate of Service in each case. On January 9, 1986, the Department filed a Notice of Serving Interrogatories and Interrogatories in docket no. 84-240-2C- Rc. On the same date the Department filed a Notice of Serving Interrogatories, Interrogatories and a Request for Production in docket no. 84-267-2CRC.

On January 16, 1986, a prehearing conference was held. At the prehearing conference the Protestor orally moved for a continuance of the evidentiary hearing set for February 18, 1986, in order to complete discovery. The Department did not resist. On January 16, 1986, the Hearing Officer

issued an Order of Continuance, rescheduling the evidentiary hearing for July 29, 1986. On February 10, 1986, the Hearing Officer issued a Prehearing Conference Order.

On February 21, 1986, the Protestor filed Answers to Interrogatories in each case. The Protestor also filed a Notice of Serving Interrogatories in each case. On March 14, 1986, the Department filed Answers to Interrogatories in each case. On July 17, 1986, the Protestor filed a Request for Production of Documents in docket no. 84-267-2C-RC, a Notice of Deposition for LaVonne Breen Klein and Dennis Schutt, and a witness subpoena for the deposition for LaVonne Klein, a/k/a LaVonne Breen. On July 21, 1986, the Hearing Officer sent to the Protestor's attorney a subpoena for service on LaVonne Klein and a return of service form. No completed return of service form was filed. On July 21, 1986, the Department filed Objections to Request for Production of Documents in docket no. 84-267-2C-RC. On July 24, 1986, the Protestor requested a hearing subpoena for Sherree Adams, a Department employee. On July 24, 1980, the Hearing Officer issued a subpoena for Sherree Adams, and a completed return of service form was filed on the same day.

The following persons appeared at the evidentiary hearing on July 29, 1986: Maurice Klein, the Protestor; Dennis Naughton, Protestor's attorney; Sherree Adams, a revenue examiner II with the Department; Dennis Schutt, a revenue examiner IV with the Department; and Gary Britson, the Department's attorney. Mr. Klein and Ms. Adams

testified. The Department did not present any witnesses. The Protestor requested that "judicial" notice be taken of the following: in the past 10 years the average earnings of women have been 59 cents for every $1.00 earned by men; in recent years it is 64 cents; and men earn more than women in most jobs, most situations, and most families. The Hearing Officer declined to take official notice.

The parties agreed to the following briefing schedule; parties' initial briefs due no later than September 2, 1986; and reply briefs due no later than September 18, 1986. The Protestor also requested an opportunity to submit "statistical data," if any, no later than September 30, 1986. The Department did not object to giving the Protestor an opportunity to submit data; however, the Department did request an opportunity to respond to the data by argument or by objecting to the data. The Department was given until October 14, 1986, to file a response, if any, to the statistical data. On August 28, 1986, the Protestor orally requested an extension to September 30, 1986, to file the initial brief. The Department did not object. On August 29, 1986, the Hearing Officer issued an Order Extending Briefing Schedule: initial briefs due no later than September 30, 1986; Protestor's "statistical data," if any, no later than September 30, 1986; reply briefs no later than October 15, 1986; and the Department's response, if any, to the "statistical data" no later than October 15, 1986. On August 29, 1986, the Department filed its initial brief. On October 3, 1986, the Protestor

filed his brief and a Notice of Filing Statistical Evidence. On October 6, 1986, the Protestor filed Protestor's Offer of Additional Statistical Evidence. On October 7, 1986, the Department filed a motion for continuance regarding the briefing schedule. On October 16, 1986, the Protestor filed a Joinder in Motion for Continuance, requesting additional time to file the Protestor's reply brief. On October 14, 1986, the Hearing Officer issued a Second Order Extending Briefing Schedule: parties' reply briefs and the Department's response to Protestor's "statistical data" due no later than November 3, 1986. On October 29, 1986, the Department filed its reply brief. On November 4, 1986, the Protestor filed his reply brief.

The following exhibits were admitted into the record at the hearing:

PROTESTOR'S EXHIBITS

1 - 1981 Iowa individual income tax return, signed by Maurice Klein and LaVonne M. Breen Klein on April 22, 1982 (9 pages);

2 - 1981 amended Iowa individual income tax return, signed by Maurice L. Klein on December 17, 1983 (2 pages);

3 - A Department letter from Sherree Adams to Maurice Klein, dated April 16, 1984 (1 page);

4 - 1981 instructions regarding filing Iowa tax returns (9 pages);

5 - 1982 Iowa individual income tax return, signed by Maurice Klein on February 7, 1983 (5 pages);

6 - Amended 1982 Iowa individual income tax return signed by Maurice L. Klein on December 22, 1983 (2 pages);

7 - Notice of Tax Due, dated April 23, 1984 (1 page); Adjustments to Individual Income Tax, signed by Sherree Adams in April 1984 (1 page); and a photocopy of 730 Iowa Admin. Code Section 41.4 (1 page);

8 - Notice of Assessment, dated May 23,1984 (1 page); Adjustments to Individual Income Tax, signed by Sherree Adams in May 1984 (1 page);

9 - 1982 instructions for filing Iowa tax returns (10 pages);

10 - 1982 Internal Revenue Service instructions regarding dependents (3 pages);

11 - Internal Revenue Service Publication 501 (Rev. Nov. 83) - Exemptions - For use in preparing 1983 Returns (9 pages

12 - Worksheet for Determining Support prepared by Protestor (1 page) and 7 attached pages of computations;

13 - Dubuque County child support payment record of Michael Breen (1 page);

14 - Selected pages from a deposition of LaVonne Klein taken during divorce proceedings on May 4, 1983 - pages 17, 18, 19-20, 21-22, 25, 29- 30, 31-32, 51, 55-56, 57-58, 59-60 (total of 11 photocopied pages).

DEPARTMENT'S EXHIBIT

A - Dissolution judgment and decree dated August 19, 1983 (3 pages); stipulation and agreement, dated August 19, 1983 (4 pages).

The statistical evidence submitted by the Protestor on October 3 and October 6, 1986, was not objected to by the Department, and is admitted into the record. The Protestor identified the statistical evidence as follows: (1) pages 316, 317 and 456 from 1986 Statistical Abstract of United States, published by United States Department of Commerce, compiled by the Internal Revenue Service and the U.S. Bureau of Census; (2) Report "Weekly Earnings of Wage and Salary Workers: Second Quarter 1986," published by Bureau of Labor Statistics, United States Department of Labor, Washington D.C. 20212, on July 25, 1986, consisting of seven pages; (3) 1982 Iowa Individual Income Tax Annual Statistical Report; (4) 1983 Iowa Individual INcome Tax Annual Statistical Report; (5) 1984 Iowa Individual Income Tax Annual Statistical Report; (6) computed percentages of persons itemizing deductions from figures found in Iowa Individual Income Tax Annual Statistical Report for 1982, 1983, and 1984; (7) computed percentages of persons itemizing deductions from 1982 Iowa

Individual Income Tax Annual Statistical Report, including "Married Separate" returns; and (8) Bulletin 298, Time of Change: 1983 Handbook on Women Workers, published by U.S. Department of Labor, Women's Bureau, Chapter III - Women's Income and Earnings.

The issues in these two consolidated cases are as follows: (1) whether the Protestor is entitled to a refund for 1981,
on the basis that he may amend the 1981 return and change the filing status without his former spouse also amending and changing the filing status (docket no. 84-240-2C-RC);

(2) whether the Protestor is allowed to claim itemized deductions for the tax year 1982 (docket no. 84-267-2C-RC); and

(3) whether the Protestor is allowed to claim his former spouse's two children as dependent exemptions in 1982 (docket no. 84-267-2C-RC).

FINDINGS OF FACT

1. Maurice L. Klein (Protestor) is a computer programmer analyst.

2. On November 27, 1981, the Protestor married LaVonne Marie Breen.

3. LaVonne Breen and the Protestor are the same age (currently 40 years old). Ms. Breen has two children from a previous marriage: a son, Chad Breen, and a daughter, Jodi Breen. The children

were approximately 13 and 10 years of age during the marriage of LaVonne Breen and the Protestor.

4. LaVonne Breen is a registered nurse. Prior to her marriage to the Protestor, LaVonne Breen worked as registered nurse and supported her children. After her marriage to the Protestor, LaVonne Breen and her children moved into the Protestor's house. LaVonne Breen continued to work as a registered nurse during her marriage to the Protestor. The Protestor continued to make his house payments and to pay for the utilities.

5. On April 22, 1982, the Protestor and LaVonne M. Breen Klein filed an Iowa individual income tax return for the calendar year 1981 (Exhibit 1). The couple used the filing status of "married filing separately on this combined return." The Protestor prepared the return using his records and receipts, some of LaVonne's checks and statements and some verbal information from LaVonne. The couple received an Iowa income tax refund of $220.10.

6. On November 12, 1982, the Protestor and LaVonne Breen separated, and Ms. Breen and her two children moved out of the Protestor's house. The couple was not legally separated under a decree of divorce or separate maintenance.

7. On February 7, 1983, the Protestor filed an Iowa individual income tax return for the calendar year 1982 (Exhibit 5). The Protestor used the filing status of "married filing separate returns." LaVonne Breen did not assist the Protestor in

filing his 1982 return, and he did not assist her. The Protestor itemized his deductions, claiming total itemized deductions of $8,566.46. The Protestor claimed Ms. Breen's two children as dependent credits (2 x $14 = $28). The Protestor received an Iowa income tax refund of $337.93.

8. On her 1982 Iowa individual income tax return, LaVonne Breen Klein did not itemize deductions, and she claimed her two children as dependents (Department's Answers to Interrogatory Nos. 2 & 3 filed on January 6, 1986, in docket no. 84-267-2C-RC; page 50 of deposition attached to protest in docket no. 84-2672C-RC).

9. On August 19, 1983, the Protestor and LaVonne Breen were divorced.

10. According to the Protestor, he though LaVonne Breen withheld information pertaining to her tax situation and possibly gave him false information. In November 1983, the Protestor called the local state revenue office. According to the Protestor, the local employee called a revenue employee in Des Moines who said the Protestor could amend the return. The Protestor does not know the names or positions of the Department employees.

11. On December 17, 1983, the Protestor filed an amended Iowa individual income tax return for the calendar year 1981 (Exhibit 2). LaVonne did not agree to or sign the Protestor's amended return. LaVonne Breen did not file an amended Iowa individual income tax return for 1981

(Department's Answer to Interrogatory No. 2, filed on January 6, 1986, in docket no. 84240-2C-RC).

12. On the Protestor's amended return for 1981, the Protestor changed the original filing status from "married filing separately on this combined return" to "married filing separate returns." The Protestor made no changes in his figures nor net income, addition for federal taxes, deduction for federal taxes, itemized deductions, Iowa taxable income, tax from tax rate schedule, total exemption credits, and Iowa income tax withheld as shown on W-2s. By changing to "married filing separate returns" for 1981, the Protestor computed that he was entitled to an additional refund of $103.76:

Original		Amended	
Total tax liability (556.82 wife + 876.00 Protestor)	$1,432.82	Protestor's tax liability	$ 876.00
Total Iowa income tax withheld on W-2 forms ($453.06 wife + 1,199.86 Protestor)	$1,652.92	Protestor's Iowa income tax with-held on W-2 forms	$1,199.86

Original		Amended	
Refund	$220.10	Refund received in 1982	- 220.10
			979.76
		Protestor's tax liability	- 876.00
		Refund	$ 103.76

13. On December 22, 1983, the Protestor filed an amended Iowa individual income tax return for the calendar year 1982 (Exhibit 6). On his original 1982 return the Protestor added all of the federal income tax refund received in 1982 ($705.68) to his Iowa net income. The change the Protestor made on the amended 1982 return was to add only one-half of the federal tax refund to his Iowa net income, stating that it was a joint refund and "she can claim her half." The Protestor computed that he was entitled to an additional refund of $28.23.

14. On April 16, 1984, a Department revenue examiner denied the $103.76 refund which the Protestor had requested by his amended 1981

return on the basis that "Mrs. Klein must also amend to use filing status #4" (Exhibit 3).

15. In April 1984, a revenue examiner conducted an office audit of the Protestor's 1982 amended return. On April 23, 1984, the Department issued to the Protestor a Notice of Tax Due for individual income tax for the year 1982 (Exhibit 7). The Department revenue examiner attached an "Adjustments to Individual Income Tax" to show the audit adjustments. The examiner prorated the federal refund according to the couple's 1981 incomes rather than 50/50 as the Protestor had on his amended return. The Protestor is not contesting this adjustment. The examiner also changed the Protestor's itemized deductions to a standard deduction of $1200.00. The examiner attached a copy of a rule which requires a spouse to take the optional standard deduction if one spouse takes it when they are filing separate returns.

16. On May 23, 1984, the Department issued to the Protestor a Notice of Assessment for individual income tax the year 1982, in the total amount of $794.60 ($633.28 tax, $73.84 penalty, $86.13 interest, and $1.35 fees) with accruing interest if not paid (Exhibit 8). The Department revenue examiner attached an "Adjustments to Individual income Tax" to the Notice of Assessment, stating that "no dependents will be allowed until support is verified."

17. The Protestor calculated that he contributed $13,035.44 in 1982 to the support of LaVonne

Breen's children (Exhibit 12). The Protestor does not know what LaVonne Breen's total income from all possible sources may have been in 1982. He testified that according to his calculations the maximum amount LaVonne Breen could have contributed in support of her children for 1982, was $3,309.40. The Protestor based his calculation on his knowledge of her earned income, her credit union checking account, and his conclusions regarding which checks were for nonsupport items. The Protestor does not know the totals LaVonne Breen spent on the children's clothing or their medical or dental bills. LaVonne Breen bought half of the groceries. After the couple separated in November 1982, LaVonne Breen purchased a stove, refrigerator, a washer and dryer. The father of the two children did not pay any child support for them through the clerk of court in 1982.

18. The Department would not provide to the Protestor LaVonne Breen's 1982 Iowa Individual income tax return pursuant to Iowa Code Sections 422.20 and 422.72.

19. On July 17, 1984, a protest was filed to the denial of the Protestor's individual income tax refund claim for the year 1981 (docket no. 84-240-2C-RC).

20. On August 16, 1984, the Protestor filed a protest to the denial of the Protestor's individual income tax refund claim for the year 1982 (docket no. 84-267-2C-RC).

CONCLUSIONS OF LAW

The Department has jurisdiction of the parties and subject matter pursuant to Iowa Code Sections 17A.12 and 422.73(2).

It is incumbent upon a taxpayer contesting a Department action to show that the action was erroneous. Richards v. Iowa Dept. of Revenue, 360 N.W.2d 830, 831 (Iowa 1985); City of Ames v. State Tax Comm'n, 246 Iowa 1016, 1025, 71 N.W.2d 15, 21 (1955); Dain Mfg. Co. v. Iowa State Tax Comm'n, 237 Iowa 531, 533, 22 N.W.2d 786, 788 (1946).

The issues in these two consolidated cases were stated in the Notice of Time, Place and Nature of Hearing and the Prehearing Conference Order. The first issue which is the sole issue in docket no. 84-240-2C-RC is whether the Protestor is entitled to a refund for 1981 on the grounds that he may amend the 1981 return and change the filing status without his former spouse also amending and changing the filing status.

In general, the Protestor contends that there is no statute or rule which prevents the Protestor from amending and changing his filing status. The Department contends that both spouses assumed joint and several liability for any amount due and should share jointly in any amount refunded and therefore both spouses must file amended returns to change filing status.
Rule 701 Iowa Admin. Code Section 39.4(5) provides as follows:

Married filing separately on the same form. Married taxpayers may file separately on the same form. This return is also known as the combined return. If a married taxpayer files a combined return with his or her spouse, any refund will be issued in both names.
Rule 701 Iowa Admin. Code Section 39.3(4) provides, in part, that a taxpayer shall file an amended Iowa return if it becomes known to the taxpayer that the amount of income reported to be federal net income or Iowa taxable income was erroneously stated on the Iowa return.

In the instant case the Protestor contends that he amended his 1981 return because he discovered that his former wife withheld information from him and possibly gave him false information. The evidence, however, failed to establish how the wife's income on the 1981 return was erroneously stated. The Protestor referred to interest on loans which his former wife could have deducted. The law, however, does not require a taxpayer to take every single deduction to which he or she might be entitled. The evidence failed to establish the basis for the Protestor amending his return. In any event the Protestor made no amendments to any of his reported figures but rather changed the filing status which affected the refund amount and distribution to the detriment of the Protestor's former spouse. When the Protestor and his former spouse agreed to the filing status of "married filing separately on this combined return," they were agreeing to the computation and the issuance of the refund in both names. The Protestor has presented no factual or legal basis which would

allow him to change that agreement without his former spouse's consent. Acceptance of the Protestor's position would be detrimental and confusing to the collection of revenue as well as detrimental to the spouse who has not agreed to the change in filing status.

The other assertions listed in the Notice of Date, Place and Nature of Hearing regarding this particular issue have not been pursued factually or with nay specific legal theories or authorities.

There is no ground for granting the Protestor a refund for 1981 based on only his amended return which changed the filing status.

The second issue is whether the Protestor is allowed to claim itemized deductions for the year 1981 (docket no. 84-2672C-RC).

Iowa Code Section 422.9(4) and 701 Iowa Admin. Code Section 41.4 specifically provide that where married persons file separately, both must use the optional standard deduction if either elects to use it.

The Protestor contends that Iowa Code Section 422.9(4) violates the equal protection and due process clauses of the fourteenth amendment of the United States Constitution and Article I, Sections 6 and 9 of the Iowa Constitution. The Protestor argues that the statute is unconstitutional on its face because it has a disparate impact on males who earn more income than females and therefore benefit more from

itemizing deductions rather than using the standard deduction.

The Department contends the following, in part: there clearly is a rational basis for requiring both spouses to use the same type of deductions; the statute applies to men and women equally; and the statute does not create any classifications.

Agencies cannot decide issues of statutory validity. Salsbury Laboratories v. Iowa Dept. of Environmental Quality, 276 N.W.2d 830, 836 (Iowa 1979). The Protestor has not cited any authority which permits a Hearing Officer to determine the constitutionality of a statute on its face. The Hearing Officer therefore will not rule on this issue.

In his briefs the Protestor raises the argument that he has been discriminated against because the Department treated him differently than his former wife, and that the Department did not pursue her after learning she provided inaccurate information. The Protestor did not adequately raise this issue prior to the hearing. In addition the allegations are not supported by the record.

Iowa Code Section 422.9(4) and 701 Iowa Admin. Code Section 41.4 specifically require both spouses to use the optional standard deduction if either spouse elects to use it. The Department was correct to disallow the Protestor's itemized deductions for 1982.

The third issue is whether the Protestor is allowed to claim his former spouse's two children as dependent exemptions in the 1982 tax year (docket no. 84-267-2C-RC).

The Protestor contends that he provided over half of the children's support under Internal Revenue Code Section 152(a) which is applicable pursuant to Iowa Code Section 422.12. The Department contends that under Internal Revenue Code Section 152(e), Schneier v. Commissioner, 735 F.2d 375 (9th Cir. 1984), and Revenue Ruling 78-91, 1978-1 C.B. 36 the Protestor's support as the new spouse of the custodial parent is attributable to the custodial parent, the Protestor's former wife.

It is unnecessary to resolve the parties' dispute regarding the above interpretation because the Protestor failed to meet his burden of proof. The Protestor contends he supplied over half of his stepchildren's support in 1982. The Protestor bases this contention on his records, his former wife's checking account at a credit union for approximately eight months in 1982, and portions of a deposition taken during May 1983, regarding their divorce. This evidence is unsufficient to establish all the income and expenditures of the Protestor's former spouse in 1982. The Protestor did not know if his former spouse had other accounts, and he was also uncertain as to all of the items and amounts she paid for regarding support. In addition although the father of the children did not pay his court ordered child support, it is unknown what other contributions he may have made. Based on this record, it is not

possible to determine the percentages of contributions. The divorce deposition is not complete and leaves open the questions of what percentages of contributions. The divorce deposition is not complete and leaves open the question of what percentage the mother provided and how she can prove it. See page 50 of deposition attached to protest in docket no. 84-267-20- RC but not included in Exhibit 14.

The Protestor asserts that the evidence is in the Department's possession in the form of the former spouse's tax returns; and that the Department has the burden to present this evidence or else it must accept the Protestor's testimony.

The Department clearly cannot provide copies of the former spouse's tax returns to the Protestor pursuant to Iowa Code 422.20 and 422.72 and 701 Iowa Admin. Code 38.6. What the Protestor is overlooking is that he has the burden of proof, and he had the opportunity to obtain information from his former spouse through discovery and the contested case proceedings. See Iowa Code 17A.13(1). In fact the Protestor did request that a subpoena be issued for his former wife. There is nothing in the record to show that the Protestor attempted to serve the subpoena. If the Protestor had followed the appropriate procedures, he could have enforced the subpoena at the district court level, if necessary. The Protestor failed to utilize the avenues available to him to meet his burden of proof. The Protestor cannot use his failure to obtain evidence as an argument to shift the burden to the Department.

In conclusion the Protestor failed to meet his burden of proof to establish that he should be allowed to claim his former spouse's two children as dependent exemptions in the 1982 tax year.

At the hearing the Protestor raised the issue of waiver of the penalty because the Protestor relied in good faith on the the instructions provided to the public. The Protestor also testified regarding the Department employee telling him to file an amended return for 1981. This issue cannot be considered because it was not raised in a timely manner before the evidentiary hearing.

Assuming arguendo that the Protestor had raised the issue in a timely manner and that estoppel could be invoked against the state, the Protestor clearly has failed to establish the essential elements of equitable estoppel. See Merrifield v. Troutner, 269 N.W. 2d 136, 137 (Iowa 1978); Good Furniture House, Inc. v. Iowa State Bd. of Tax Review, 382 N.W.2d 145, 151 (Iowa 1986); and S & H Finance Co., Ft. Dodge v. Iowa State Tax Commission, 162 N.W.2d 505, 510 (Iowa 1968).

In conclusion the Protestor failed to establish entitlement to additional income refunds for 1981 and 1982. The Department was correct to deny the refund claims. The Department was also correct to disallow the Protestor's itemized deductions for the year 1982 and to disallow the Protestor's claim to the two children as dependent credits for the year 1982. The Department actions are affirmed, and the protests are dismissed.

No affidavit has been filed by the Protestor under rule 701 Iowa Admin. Code 7.9, seeking deletion of identifying details in this matter, if any.

Pursuant to Iowa Code 17A.15(3) (1987) this Proposed Order becomes the final order of the Iowa Department of Revenue and Finance without further proceedings unless there is an appeal to, or review on motion of, the Department within thirty (3) days of the issuance of this Proposed Order.

Issued at Des Moines, Iowa, this 31st day of July, 1987.

* * *

APPENDIX C

BEFORE THE IOWA DEPARTMENT OF REVENUE AND FINANCE HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

IN THE MATTER OF

NOTICE OF APPEAL MAURICE L. KLEIN
4706 Melody Circle DOCKET NOS. 84-240-2C-RC
Dubuque, Iowa 520001 84-267-2C-RC

INCOME TAX REFUND CLAIMS

COMES NOW the undersigned Protestor Maurice L. Klein and, pursuant to I.A.C. 701-7.17(5) serves Notice of Appeal to the Director of the Iowa Department of Revenue and Finance, and states as follows:

1. A Proposed Order was issued herein by Hearing Officer Linda Erickson on July 31, 1987.

2. After a careful reading of Sections 17A.15(3), 17A.15(4), 17A.16, and 17A.19, Code of Iowa 1987, as well as Chapter 7, Rule 730, now apparently Rule 701, and specifically Rules 701-7.17(5), 701-7.20 and noting apparent uncertainty as to the vesting of finality regarding Proposed Orders and the uncertainty as to the finality of Proposed ORders as it relates to Appeal, Review, Rehearing,

and Judicial Review, the Protestor files this Notice of Appeal to the Director of the Iowa Department of Revenue and Finance in a further attempt to exhaust his administrative remedies.

Taxpayer/Protestor is prejudiced by uncertain and conflicting definitions between the Code and Department Rules. See Boyd, Exhaustion of Administrative Remedies in Iowa After "LeaseAmerica Corp. v. Iowa Department of Revenue", 69 IaL.Rev. 755 (1984).

3. Under Rule 701-7.17(5) it is stated:

"Orders will be issued within 30 days of the termination of the hearing unless good cause exists for a further period of time not to exceed a reasonable period."

An Evidentiary Hearing was held before Linda Erickson, Hearing Officer of the Iowa Department of Revenue and Finance, on July 29, 1986; Orders setting time for filing Briefs and Extending Time for Filing Briefs were subsequently entered by the Hearing Officer; the Final Brief was filed with the Hearing Officer on November 3,1986
The Proposed Order of the Hearing Officer was issued at Des Moines, Iowa, on the 31st day of July, 1987.
The Supreme Court of Iowa in dicta states, "...it is in the over-all interests of litigants and the public at large that administrative proceedingsmove to aprompt conclusion." Ford Motor v. Ia. Dept. ofTransp., 282 N.W.2d 701 (Iowa 1979).

The Taxpayer/Protestor is prejudiced by unreasonable protracted delays.

4. This Protestor is entitled to an immediate consideration by the Director pursuant to Rule 701-7.17(5) or denial of consideration pursuant to said Rule in order to continue to exhaust his administrative remedies. See LeaseAmerica v. Iowa Department of Revenue, 333 N.W.2d 847 (Iowa 1983); Oliver v. Iowa Power, 183 N.W.2d 687 (Iowa 1971); Rowen v. LeMars Mutual, 203 N.W.2d 905 (Iowa 1975); Iowa Industrial Commissioner v. Davis, 286 N.W. 2d 658 (Iowa 1979); Ellis v. Iowa Department of Job Service, 285 N.W.2d 153 (Iowa 1979).

The Taxpayer/Protestor will continue to be prejudiced by further delays.

5. The Hearing Officer erred when she made the following Conclusion of Law: "When the Protestor and his former spouse agreed to the filing status of 'married filing separately on this combined return' they were agreeing to the computation and the issuance of the refund in both names. The Protestor has presented no factual or legal basis which would allow him to change that agreement without his former spouse's consent. Acceptance of the Protestor's position would be detrimental and confusing to the collection of revenue as well as detrimental to the spouse who has not agreed to the change in filing status."... "There is no ground for granting the Protestor a refund for 1981 based

on only his amended return which changed the filing status."

Rule 701-7.17(5) provides in applicable part as follows:

"Each Conclusion of Law shall be supported by cited authority or by a reasoned opinion."

The above Conclusion of Law is not supported either by reasoned opinion or citation of authority. The facts substantiate that prior to the filing of the 1981 Iowa Individual Income Tax Return and the agreed upon filing status, the taxpayer and his former spouse were married and agreement was possible. Subsequent to the filing of the 1981 tax return and prior to the filing of the 1981 Amended Iowa Individual Income Tax Return by the Protestor herein, the Protestor and his former spouse were in the throes of a dissolution of marriage, subsequently granted, at which time agreement to anything is impossible. Acceptance of the Protestor's position in this matter would be equitable under the circumstances since the Protestor/Taxpayer has not actually changed his filing status except for the fact that he is married filing separately on a separate tax form. The holding by the Iowa Department of Revenue and Finance Hearing Officer is arbitrary and discriminatory. See Departmental Rules 39.3(4) and 39.4(6). No similar situation could exist under federal law or with regard to a federal tax return, since such married filing separately on a combined return is not available under federal tax law or regulations. The Hearing Officer's reliance on

federal law for guidance is, therefore, improper. The Department's position must be overruled.

6. The Hearing Officer erred in not ruling on the Constitutionality of Section 422.9(4), the Code, and states as her reason that agencies cannot decide issues of statutory validity; that the Protestor has not cited an authority which permits a Hearing Officer to determine the constitutionality of a statute on its face; and the Hearing Officer therefore will not rule on this issue. The Hearing Officer further concludes that the Protestor did not adequately raise this issue prior to the hearing.

This issue was raised in Paragraph 4 of the original Protest filed herein in July of 1984 and docketed by the Department in August of 1984. In August of 1984, the Protestor reasserts this issue in Paragraph 5 of the Amendment to Protest filed herein. This issue is further referred to in Paragraph 6, Paragraph 7, Paragraph 8, Paragraph 9 and Paragraph 10 of the Amended Protest filed herein.

This issue again was discussed under Proposition II of Protestor's Brief and Argument filed herein in September of 1986. This matter of constitutionality is again discussed in the Protestor's Reply Brief in response to Department's Brief Point No. V:

"Whether the Department in its treatment of Protestor has violated his civil rights by denying

him equal protection or depriving him of his property unjustly."

At this time, the Protestor would reassert all matters contained in Proposition II of Protestor's Brief and Argument filed in September of 1986, and Protestor's Reply Brief filed in November of 1986. In addition, the Protestor reasserts all statistical information provided to the Hearing Officer in September of 1986.

Hearing Officer Erickson states the Constitutional Issue under both docket numbers in the Notice of Time, Place and Nature of Hearing filed herein on October 15, 1985. (See Notice in file).

Fact finding by Hearing Officer is essential to determine "on face" unconstitutional question vis-a-vis "an applied" unconstitutional question. (See Matters v. City of Ames, 219 N.W.2d 718, Iowa 1974). Hearing Officer erred by not addressing the issue.

7. The Hearing Officer erred in the Conclusion of Law that Protestor failed to meet his burden of proof to establish that he should be allowed to claim his former spouse's two children as dependent exemptions in the 1982 tax year.

The Hearing Officer relies on the fact that the issue was raised by the Protestor and that insufficient evidence was produced by the Protestor to substantiate his right to claim his former spouse's children as dependent exemptions on the 1982 tax return.

Section 17A.12(8) of the Code, provides:

"In a contested case...findings of fact shall be based solely on the evidence in the record and on matters officially noticed in the record."

Section 17A.14(1) of the Code, provides:

"In contested cases. a finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to reply for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial. Agencies shall give effect to the rules of privilege recognized by law."

The Protestor contends that having raised the issue and providing as much evidence as he had available to him shiftsd the burden of proof to the Department to refute the evidence submitted by the Protestor or accept his evidence in reaching a conclusion.

The Department chose to submit no evidence.

The Hearing Officer chose to find that the evidence was in-sufficient to support the contention of the Protestor. Any evidence at all is a basis for supporting a contention that the Protestor overlooked the fact that he had the burden of proof and failed to utilize the avenues available to him to meet his burden of proof. See Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632 (Iowa 1969) (Re Sufficiency of Evidence). Also see

Dickman v. Truck Transport Inc., 224 N.W.2d 459 (Iowa 1974); Rice v. Messingham, 55 N.W.2d 925 (Iowa 1952).

Moreover, as shown in Protestor's Brief, to the extent of the evidence presented by Protestor the burden shifted.

It is unconscionable that the State on the one hand would rely on the presumption of correctness of its position without producing the evidence relating to that position and then on the other hand assert, without introducing evidence at all, that the burden of proof is on the Protestor. See Bass v. Muenchow, 146 N.W.2d 923 (Iowa 1966) and Crosser v. Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). Also See Wilson v. Findley, 275 N.W. 47 (Iowa 1937).

WHEREFORE, your Protestor herein, Maurice L. Klein, files this Notice of Appeal, requests that the Director of the Iowa Department of Revenue and Finance rehear the matters requested herein and that the decision of the Hearing Officer be set aside and held for naught.

* * *

APPENDIX D

BEFORE THE IOWA STATE DEPARTMENT OF REVENUE AND FINANCE
HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

IN THE MATTER OF

MAURICE L. KLEIN
4706 Melody Circle
Dubuque, Iowa 5200

ORDER OF DIRECTOR UPON REVIEW OF HEARING OFFICER'S PROPOSED ORDER

INCOME TAX REFUND CLAIMDOCKET NOS. 84-240-2C-RC

DOCKET NOS. 84-267-2C-RC

On August 26, 1987, the Protestor, Maurice L. Klein, filed an appeal to the Director of the Iowa Department of Revenue and Finance, requesting a review of the Hearing Officer's Proposed Order issued on July 31, 1987. On September 1, 1987, the Director issued a Notice of Director's Review of Hearing Officer's Proposed Decision setting a review date of October 6, 1987. On September 21, 1987, Protestor filed a Motion for Continuance, a Request to Appear At Director's Review and a Request to Submit Additional Evidence. On September 21, 1987, the Department filed it's Request to Appear at Director's Review along with it's written resistance to Protestor's request to submit additional evidence. In an Order issued October 6, 1987, the Director continued and rescheduled the review for October 27, 1987 and granted permission to both parties to attend the

Review of the Hearing Officer's Proposed Decision. In an Order dated October 16, 1987, the Director denied Protestor's request to submit additional evidence.

Attending the Review Of The Hearing Officer's Proposed Decision (conducted on October 27, 1987) were the Protestor and his Authorized Representative and Attorney-at-law, Dennis J. Naughton; and Appeals Officer and Authorized Representative for the Department, Gary L. Britson. In an Order issued on November 25, 1987, the Director extended the time for issuing his Order to December 15, 1987. Having examined the record developed by the parties, the Director hereby issues his Order.

STATEMENT OF THE CASE

The Director hereby adopts and fully incorporates into this Order the Procedural Summary as set forth in the Hearing Officer's Proposed Order.

FINDINGS OF FACT

The Director hereby adopts and fully incorporates into this Order the Findings of Fact as set forth in the Hearing Officer's Proposed Order.

CONCLUSIONS OF LAW

The Director hereby adopts and fully incorporates into this Order the Conclusions of Law as set forth in the Hearing Officer's Proposed Decision with the exception of the fourth paragraph (second from the bottom) on page 12. That paragraph refers to itemized deductions claimed for 1981 and should,

instead, refer to those claimed in 1982. Accordingly paragraph 4, page 12 is rescinded in its entirety and the following is inserted in lieu thereof:

The second issue is whether the Protestor is allowed to claim itemized deductions for the year 1982 (docket no. 84-2672C-RC).

IT IS THEREFORE ORDERED that the Hearing Officer's Proposed Order issued on July 31, 1987, is adopted in its entirety with the deletion of paragraph 4, page 12 and the insertion in lieu thereof of the foregoing. With respect to the record developed by the parties, it is the conclusion of the Director that the evidence is more than substantial to support the proposed order of the Hearing Officer. The denial of the refund claims is affirmed.

No affidavit has been filed by the Protestor under rule 701- 7.9 IAC, justifying deletion of any information contained in the record prior to public inspection.

This Director's decision is the final Order of the Iowa Department of Revenue and Finance.

Issued at Des Moines, Iowa this 2nd day of December, 1987.

* * *

APPENDIX E

IN THE IOWA DISTRICT COURT FOR DUBUQUE COUNTY

MAURICE L. KLEIN,

Plaintiff,
vs.

EQUITY NO. 85988
PETITION FOR JUDICIAL REVIEW

THE IOWA DEPARTMENT OF REVENUE AND FINANCE,

Defendant.

COMES NOW the Plaintiff, Maurice L. Klein, and states to the Court as follows:

1. Plaintiff is a resident of Dubuque County, Iowa, residing at 4706 Melody Circle, Dubuque.

2. The Iowa Department of Revenue and Finance is a duly constituted and authorized department of the Executive Branch of the State of Iowa organized and existing under the Constitution and laws of the State of Iowa.

3. A Final Order of the Iowa Department of Revenue and Finance was entered by G.D. Bair, Director of the Iowa Department of Revenue and Finance, on December 2, 1987, with regard to Docket Nos. 84-240-2C-RC and 84-267-2C-RC and

titled "In the Matter of Maurice L. Klein, 4706 Melody Circle, Dubuque, Iowa 52001, Income Tax Refund Claims," before the Iowa Department of Revenue and Finance.

4. The Final Order of the Iowa Department of Revenue and Finance exhausted the administrative remedies available to the Plaintiff.

5. The Final Order by the Director of Iowa Department of Revenue and Finance was the final culmination of administrative procedures which began with the filing of Protests by the Plaintiff/Taxpayer with Iowa Department of Revenue and Finance Docket No. 84-240-2C-RC on July 17, 1984, and in Docket No. 84267- 2C-RC on August 20, 1984, the respective dates docketed.

6. On July 19, 1985, the Tax Review Committee of the Iowa Department of Revenue, by letter, provided the Taxpayer/Plaintiff with a denial to the Protests filed in both cases.

7. On August 14, 1985, the Taxpayer/Plaintiff filed a Notice of Disagreement with Tax Review Committee's findings and a Notice of Request for Commencement of Contested Case proceedings in both Protest cases.

8. On August 29, 1985, the Iowa Department of Revenue and Finance filed Answers to the original Protests filed in both cases.

9. On January 10, 1986, a Pre-hearing Conference was held before Hearing Officer Linda Erickson of the Iowa Department of Revenue and Finance in

both cases, and on February 10, 1986, a Pre-hearing Conference Order was filed by Hearing Officer Erickson in both cases.

10. On July 29, 1986, an Evidentiary Hearing was held with respect to the Protests in both cases before Hearing Officer Linda Erickson of the Iowa Department of Revenue and Finance.

11. Under date of July 31, 1987, a Proposed Order was entered by Hearing Officer Linda Erickson pursuant to the Evidentiary Hearing held on July 29, 1986.

12. Notice of Appeal to the Director was filed by the Plaintiff/Taxpayer with the Iowa Department of Revenue and Finance on August 26, 1987.

13. On October 27, 1987, G. D. Bair, Director of the Iowa Department of Revenue and Finance held a Review of the Hearing Officer's Proposed Order with the Plaintiff/Protestor, his authorized representative and attorney-at-law, the Appeals Officer and an authorized representative of the Department present.

14. This Judicial Review of the Final Order of G. D. Bair, Director of the Iowa Department of Revenue and Finance is taken pursuant to Section 17A.19, Code of Iowa, 1987, after the Plaintiff/Taxpayer has exhausted all administrative remedies available to him under Chapter 17A, Code of Iowa, 1987, the Administrative Procedure Act.

15. Director G. D. Bair of the Iowa Department of Revenue and Finance in his Final Order of December 2, 1987, adopted the Statement of the Case, Findings of Fact, and Conclusions of Law and fully incorporated same as set forth in the Hearing Officer's Proposed Decision with one minor exception.

16. The Plaintiff/Taxpayer alleges that the Iowa Department of Revenue and Finance erred in the following respects:

(a) The Director of the Iowa Department of Revenue and Finance erred in denying the request of the Plaintiff/Taxpayer to present additional evidence with regard to the Director's Review of the Hearing Officer's Proposed Order, said Order of denial having been entered on October 16, 1987.

(b) The Director of the Iowa Department of Revenue and Finance erred in not addressing individually the specifications of error set out in Paragraphs 1 through 7 of the Notice of Appeal filed with the Iowa Department of Revenue and Finance on August 26, 1987, by Taxpayer/Plaintiff.

(c) The Hearing Officer and the Director of the Iowa Department of Revenue and Finance erred in not ruling on the constitutionality of Section 422.9(4), The Code.

(d) The Hearing Officer and the Director of the Iowa Department of Revenue and Finance erred in failing to overrule the Department's position that there is no ground for granting the Protestor a

refund for 1981 based on only his amended return which changed the filing status and that the stated Conclusion of Law is not supported either by reasoned opinion or citation of authority.

(e) The Hearing Officer and the Director of the Iowa Department of Revenue and Finance erred in the Conclusion of Law that Plaintiff/Protestor/Taxpayer failed to meet his burden of proof to establish that he should be allowed to claim his former spouse's two children as dependent exemptions in the 1982 tax year.

(f) The Hearing Officer and the Director of the Iowa Department of Revenue and Finance erred in arriving at the Conclusions stated in the Proposed Order and the Final Order because the Conclusions of Law are unsupported by substantial evidence and by record made before the agency when that record is viewed as a whole.

(g) The Hearing Officer and the Director of the Iowa Department of Revenue and Finance erred in that the Conclusions of Law contained in the Proposed Order and Final Order are arbitrary and characterized by an unwarranted exercise of discretion in the application of statutory law and administrative rule.

17. The Plaintiff/Taxpayer has been unreasonably and unduly prejudiced by protracted delays in the administrative procedures herein commencing in July/August 1984 and continuing through December 1987.

18. The Plaintiff/Taxpayer has been unreasonably and unduly prejudiced in the application of the presumption of correctness rule by the Iowa Department of Revenue and Finance.

19. The constitutionality of Section 422.9(4), The Code, should be addressed by this Court. The Plaintiff/Taxpayer alleges that his constitutional rights under Article I, Section 1 of the Constitution of the State of Iowa; Article I, Section 6 of the Constitution of the State of Iowa; and the Fourth and Fourteenth Amendments to the United States Constitution under the Equal Protection Clause have been denied for the following reasons:

(a) The Taxpayer's filing status was not actually changed on the amended return filed with regard to the 1981 tax year of the Taxpayer; in fact, the parties filed separately on the original return and the Taxpayer desires to retain such separate filing status on a separate return.

(b) The Taxpayer elected to amend his 1981 income tax return to file his own separate information on a separate return following the commencement of a presumably amicable dissolution of marriage proceeding between the Taxpayer and his former wife.

(c) The Iowa Department of Revenue and Finance denied the Taxpayer's change of filing status and denied him a refund based upon his amended 1981 individual income tax return.

(d) To deprive him of this right, deprives him without statutory or other authority of the right to peace of mind and the right to protection of his property and his rights.

(e) The position of the Iowa Department of Revenue and Finance gives the ex-spouse of the Taxpayer sole control over the status of the parties' tax liability, thereby treating her differently from him and depriving this Taxpayer of uniform treatment of the income tax law and equal protection of the law.

(f) To deny this TAxpayer the right to amend because of the election of an ex-spouse not to amend is unfair, prejudicial and unconstitutional.

20. The position of the Iowa Department of Revenue and Finance with regard to the Plaintiff/Taxpayer's 1982 tax return requiring the Taxpayer to use a standard deduction because his former wife used a standard deduction pursuant to Section 422.9(4), Code of Iowa, is discriminatory and in violation of federal tax law and is unconstitutional on the following grounds:

(a) Said statute denies the Taxpayer the right to claim proper and legal tax deductions in violation of Article I, Section 6 of the Iowa Constitution depriving him of his right to his property, as well as to equal protection under the Fourth and Fourteenth Amendments to the Constitution of the United States.

(b) The administrative rules of the Iowa Department of Revenue and Finance requiring that a Taxpayer must use a "standard deduction" and may not itemize deductions on his income tax return unless his spouse also filing separately uses the same procedure is unfair, prejudicial and unconstitional.

(c) The statute and administrative rules of the Iowa Department of Revenue and Finance are unfair, discriminatory and unconstitional in that they operate in favor of one spouse over the other; favor the low-income spouse; favor the female spouse over the male spouse and do not provide uniform treatment of married persons as opposed to single persons and husbands as opposed to wives.

21. Plaintiff/Taxpayer is entitled to a de novo review of the matters before the Iowa Department of Revenue and Finance. WHEREFORE, the Plaintiff/Taxpayer, Maurice L. Klein, prays that the Court judicially review the decision of the Iowa Departmento f Revenue and Finance in the contested case with respect to his 1981 and 1982 Iowa individual income tax returns and the subsequent denial of refunds based upon amendments to those returns, that the Court address the constitutionality of statutory provisions and administrative rules of the Iowa Department of Revenue and Finance, review the sufficiency of evidence and Conclusions of Law stated in the Orders of the Iowa Department of Revenue and Finance, and for such other relief which Taxpayer/Plaintiff may be entitled as

determined by the Court, pursuant to Section 17A.19(8), the Code, 1987.

• • •

APPENDIX F

IN THE DISTRICT COURT OF IOWA, IN AND FOR DUBUQUE COUNTY

MAURICE L. KLEIN,

Plaintiff,

vs.

EQUITY NO. 85988

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Defendant.

JUDGMENT AND DECREE

Plaintiff's Petition for judicial review was submitted on written argument, there being no material issue on any of the facts (as distinguished from conclusions) set forth in Plaintiff's Petition. After considering the arguments, the Court makes the following determination.

1. As stated, Plaintiff objects to the refusal of the Department to allow Plaintiff to amend his 1981 income tax return without his spouse similarly amending as required by Code Section 422.9(4) which provides:

*4. Where married persons file separately, both must use the optional standard deduction if either elects to use it."

2. There seems to be no question that taxpayer and his spouse were married during the years 1981 and 1982 and that in 1981 he and his wife originally filed a combined return with each filing as married taxpayers filing separately.

3. The proposed amendment changed his filing status from "married filing separately on a combined return" to "married filing separate returns". The Department refused to permit such amendment unless Mrs. Klein made a similar amendment.

4. In 1982, taxpayer filed a return with a filing status, "Married filing separate returns" and claiming itemized deductions, many of which deductions included expenditures on behalf of Mrs. Klein's children of a former marriage. In the same year, Mrs. Klein filed a separate return claiming the standard deduction. Once more the Department disallowed the claim of itemized deductions both on the basis of the provisions of Section 422.9(4) of the Iowa Code and Section 152(e) of the U.S. Internal Revenue Code.

5. Plaintiff's objections are primarily directed to the constitutionality of Iowa Code Section 422.9(4) on the basis that same is discriminatory because of sex and makes the election exercised by his wife binding upon him. It is only fair, despite Plaintiff's argument, that the Department

adopt such a position since the parties must be treated equally until there is a valid distinction. Such distinction between male and female with regard to restrooms and vacating sinking vessels is valid, but not ordinarily with regard to financial matters. The issue here (and the only area with which this hearing is concerned) is whether the taxpayer and his spouse must join in an election not to use the standard deduction. The law has imposed the tax based upon the standard deduction. As a matter of grace and not of right it grants an election to do otherwise on the condition that the election is equitable under rules prescribed by the Director. the standard deduction was worked out as an option based upon the very premise (presumedly) upon which Plaintiff bases his argument. Logically then, any election to not use the standard deduction but to itemize must be joined in by the other party to the return as it is based upon the premise that both are using it. If one party wishes to elect the different procedure, it is only equitable that he restore the complete status quo and not just his election.

6. Further, under the provisions of the Internal Revenue Code Section 152(e)(5), if a child receives over half of his support during the calendar year from his parents who are divorced, and such child is in the custody of one of his parents for more than one-half of the calendar year, such child shall be treated for the purposes of the definition of "dependent" as the parent having the custody for the greater portion of the calendar year (which, in the present instance, is Mrs. Klein); and under subsection (5), in the case of a remarriage,

support of the child received from the parent's spouse (Mr. Klein) shall be treated as having been received from Mrs. Klein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff's Petition for judicial review is overruled and the Department's determination confirmed.

Costs are taxed to Plaintiff.

Done and Ordered this 13th day of October, 1988.

* * *

APPENDIX G

IN THE DISTRICT COURT OF IOWA, IN AND FOR DUBUQUE COUNTY

MAURICE L. KLEIN,

Plaintiff,

vs.

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Defendant.

EQUITY NO. 85988

MOTION TO AMEND OR ENLARGE FINDINGS OR CONCLUSIONS

COMES NOW Petitioner, Maurice L. Klein, pursuant to Iowa Rule of Civil Procedure 179(b), and respectfully moves that the Court enlarge or amend its findings and conclusions contained in the October 13, 1988 Judgment and Decree in the following particulars:

1. Clarify the following statement contained in paragraph 5 of the Judgment and Decree: "...parties must be treated equally until there is a valid distinction. Such distinction between male and female with regard to restrooms and vacating sinking vessels is valid, but not ordinarily with regard to financial matters." Clarify why there is not a valid distinction with regard to financial matters since in this case, the person in the higher tax bracket was not allowed to make his own decision with regard to selecting whether or not he wished to take the standard deduction or to itemize according to Iowa Code Section 422.9(4).

2. Set forth the legal basis for the following statement contained in paragraph 5 of the Judgment and Decree: "The law has imposed the tax based upon the standard deduction. As a matter of grace and not of right it grants an election to do otherwise on the condition that the election is equitable under rules prescribed by the Director."

3. Set forth the legal and constitutional basis for Internal Revenue Code Section 152(e) in that it denies the stepparent, who has provided more than half of the support of the stepchildren residing with him, to not be compensated, through deductions on his tax return, for his support of those children considering the fact that "Under Iowa law, a step-parent living with his step-children is legally obligated to provide for their support." Kelley v. Iowa Dept. of Social Services, 197 N.W.2d 192, 199 (Iowa), appeal dismissed, 409 U.S. 818, 93 S.Ct. 170 (1972). Also cited at

Fransen v. Iowa Dept. of Human Services, 376 N.W.2d 903 (Iowa 1985). Since the Plaintiff is legally obligated to support his stepchildren, it would only seem logical that he would be allowed to take the deductions for them on his income tax return.

The issue that allowing a person to claim someone else's children as dependents if single, but not if you are married, violates the Privileges and Immunities clause, Article IV, Section 1; the Interstate Commerce clause Article I, Section 8; the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and Article I, Section 6 and Section 9 of the Iowa Constitution is not fully addressed in the Judgment and Decree.

4. The issue of Iowa Code Section 422.9(4) violating the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 and Section 9 of the Iowa Constitution are not fully addressed in the Judgment and Decree, as requested in paragraph 19, a - f, of Plaintiff's Petition for Judicial Review. This court makes no ruling regarding whether or not Section 422.9(4), the Code, is constitutional or unconstitutional as requested by the Plaintiff.

WHEREFORE, the Plaintiff respectfully requests that the Court amend or enlarge its findings and conclusions in the requested particulars.

* * *

APPENDIX H

IN THE DISTRICT COURT OF IOWA, IN AND FOR DUBUQUE COUNTY

MAURICE L. KLEIN,

Plaintiff,

vs. EQUITY NO. 85988

IOWA DEPARTMENT OF

REVENUE AND FINANCE,

Defendant.

JUDGMENT AND DECREE

October 13, 1988, after hearing, the Court entered Judgment and Decree herein whereupon Plaintiff filed on October 28, 1988, Motion to Amend its findings and conclusions. Pursuant to agreement of the parties, the matter was submitted without oral argument.

Upon reconsideration of its decision, the Court is of the opinion that it was correct in the rationale expressed in Paragraph 5 of its judgment insofar as the same applied to the amended return of 1981. In that return, the Plaintiff made an election, joined in by his then wife, to use the

"standard deduction". He then later undertook to file an amended return showing deductions actually incurred in that year. The Court still finds that if he wishes to do that, he must restore the entire status quo by having his wife of that year make a similar election. Since he failed to do so, his amendment must fail.

But, on considering the 1982 return, the Court now finds that the rationale applicable to the 1981 return does not apply because he did not initially, in 1982, elect the standard deduction as he did initially in 1981. This is not a matter of seeking opportunity to change his mind later, but deals with the initial election.

The Court now finds that both the State and Plaintiff misread Section 422.9(4). The applicable portion of Section 422.9 read:

"In computing taxable income of individuals, there shall be deducted from net income the larger of the following amounts:"

1. (optional standard deduction).
2. (itemized deductions).

It then goes on in Subparagraph 4 to say:
"4. Where married persons file separately, both must use the optional standard deduction if either elects to use it."

The State reads that to mean that the election to use the standard deduction forces the other to use it. This is, of course, incorrect.

The section involved initially defines the deduction of the Larger of either the standard deduction or the itemized deductions but qualifies that by subsection 3 so that married persons must both use the same deduction. It does not award to the spouse the unrestricted election to require the other to use the standard deduction. It merely imposes the requirement that, for either to use the standard deduction, both must. So that, in the absence of a joint election, neither may. In requiring Plaintiff to use the standard deduction because his then wife did, Defendant was in error and should not have allowed the wife to use the standard deduction because the Plaintiff failed to.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Judgment and Decree entered herein October 13, 1988, is modified by deleting the two final paragraphs and the date thereof and substituting the following:

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff taxpayer's 1982 return is modified by allowing Plaintiff to deduct itemized deductions as claimed in the 1982 return.

"Costs are taxed to both parties equally."

Done and Ordered this 10 day of November, 1988.

* * *

APPENDIX I

IN THE SUPREME COURT OF IOWA

No. 422/88-1817

Filed February 21, 1990

MAURICE L. KLEIN,
Appellee,

vs.
IOWA DEPARTMENT OF REVENUE AND FINANCE,

Appellant.

Appeal from the Iowa District Court for Dubuque County,
Thomas Nelson, judge.

Respondent appeals from district court decision reversing agency determination that petitioner-taxpayer could not itemize deductions on 1982 state income tax return; petitioner crossappeals from that part of decision upholding agency determination that petitioner could not claim spouse's two minor children as dependents on the return. REVERSED ON THE APPEAL; AFFIRMED ON THE CROSS-APPEAL.

Thomas J. Miller, Attorney General, Harry M. Griger, Special Assistant Attorney General, and Lucille M. Hardy, Assistant Attorney General, for appellant.

Dennis J. Naughton of Naughton, Stenlund & Reilly, Dubuque, for appellee.

Considered by Harris, P.J., Larson, Schultz, Lavorato, and Snell, JJ.

LAVORATO, J.

According to an Iowa income tax statute when married persons file separate returns, both must use the optional standard deduction if either elects to use it. Iowa Code Section 422.9(4)

(1981). This appeal presents the following question: If one spouse uses the standard deduction, may the other spouse itemize deductions? The district court thought so, but we disagree and reverse. We affirm as to the issues raised in the cross appeal.

Maurice L. and LaVonne M. Klein were divorced on August 19, 1983. They separated in November 1982. But the separation was not pursuant to a decree of dissolution or separate maintenance.

In February 1983 Maurice filed an individual Iowa income tax return for the calendar year 1982. He used the filing status of "married filing separate returns" and itemized his deductions. Se Iowa Admin. Code 701-39.4(5) (1981).

On her 1982 return, LaVonne did not itemize deductions. Instead she chose to take the standard deduction. See Iowa Code Section 422.9(1).

After auditing Maurice's 1982 return, the Iowa Department of Revenue and Finance disallowed the itemized deductions and replaced them with the standard deduction. The department also denied Maurice the right to claim his two minor stepchildren as dependents.

Muarice received a tax due notice from the department, requesting payment of $773.84. See Iowa Code Section 422.25. Maurice later received a tax due notice in the amount of $794.60.

Maurice paid the $794.60 under protest. He then sent the department a claim for income tax refund/protest regarding the 1982 return. See Iowa Admin. Code 701-7.8 (17A); 701-7.14(17A).

After an evidentiary hearing, the hearing officer entered a proposed order. See id. at 701-7.17(5). The hearing officer concluded that

Iowa Code section 422.9(4) and 701 Iowa Administrative Code section 41.4 specifically require both spouses to use the optional standard deduction if either spouse elects to use it. The department was correct to disallow [Maurice's] itemized deductions for 1982.

The hearing officer also concluded that Maurice had failed to prove he was entitled to claim LaVonne's two children as dependents.

Maurice appealed to the director of the department, who adopted the hearing officer's proposed order in its entirety. See Iowa Code

Section 422.28. Maurice then filed a petition for judicial review in the district court. See Iowa Code Section 422.55.

The district court initially affirmed the director's decision. Later, in response to Maurice's motion to amend findings and conclusions, the court modified its earlier ruling. This time the court allowed Maurice to itemize deductions as he had done on his 1982 return. It is from this ruling that the department appeals, contending that the district court erroneously interpreted Iowa Code section 422.9(4).

Maurice cross-appealed from the part of the district court ruling that affirmed the director's order on the dependency exemption issue. One of the issues Maurice raises here centers on the hearing officer's refusal to require the department to furnish Maurice with LaVonne's 1982 tax return. Another issue Maurice raises concerns the hearing officer's refusal to require the department to furnish him with information to show that LaVonne supported her two children. These refusals, Maurice argues, shifted the burden of proof on the dependency exemption issue to the department -- a burden the department failed to meet.

In addition Maurice contends the department and the district court, in denying the dependency exemptions, incorrectly applied section 152 of the Internal Revenue Code. Finally, Maurice challenges the constitutionality of section 422.9(4) on the

grounds of equal protection under both the federal and Iowa constitutions.

I. Scope of Review. Judicial review of the actions of the department of revenue is governed by the Iowa Administrative Procedure Act (IAPA). See Iowa Code Sections 17A.19(8), 422.55. Acting in our appellate capacity, we review the agency's decision solely to correct any errors of law. Norland v. Iowa Dep't of Job Serv., 412 N.W.2d 904, 908 (Iowa 1987).

When the agency's action involves statutory interpretation or matters of law, "we owe the agency only limited deference. . . ." Id. This is because "law issues are determinable by the judiciary alone. . . ." Id. (citations omitted).

Our inquiry into the agency's findings is, however, more limited. Id. On appeal, the agency's factual findings are binding if supported "by substantial evidence in the record made before the agency when that record is viewed as a whole." Iowa Code Section 17A.19(8)(f). This limited scope of factual review requires us to ask only if the evidence submitted supports the findings actually made. Norland, 412 N.W.2d at 908.

II. The Appeal--The Itemized Deduction Issue. Iowa Code section 422.9(4) provides in pertinent part:

In computing taxable income of individuals, there shall be

deducted from net income the largest of the following
amounts:

1. [Optional standard deduction].

2. [Itemized deductions].

4. Where married persons file separately, both must use the optional standard deduction if either elects to use it.

The district court explained its interpretation of the provision this way:

[Subsection 4] does not award to one spouse the unrestricted election to require the other to use the standard deduction. It merely imposes the requirement that, for either to use the standard deduction, both must. So that, in the absence of a joint election, neither may. In requiring plaintiff to use the standard deduction because his then wife did, [the department] was in error and should not have allowed the wife to use the standard deduction because [Maurice] failed to.

We agree with the department that subsection four is clear: if either spouse elects to use the standard deduction then both must. See Iowa Code Section 422.9(4); Iowa Admin. Code 701-41.4; Margulies, An Overview of State Taxation of Individual and Corporate Income in Iowa, 26 Drake L. Rev. 57, 70 (1976-77) (emphasis added). Subsection four does not require a joint election, a requirement the district court read into it. A

joint election requires a combined decision made by both spouses. The code, however, used the word "either," which means that one or the other can make the decision to use the standard deduction. Once this decision is made, the code then requires the nonelecting spouse to use the same deduction. The district court erred in concluding otherwise, and we reverse its judgment on this issue.

III. The Cross Appeal.

A. The discovery issue. During the administrative proceedings Maurice asked the department to give him copies of LaVonne's 1982 return. He also served the department with interrogatories requesting information from that return. In response, the department reminded Maurice that he had already attached a copy of her return to his original protest and that, in any event, confidentiality statutes governing tax records precluded the department from giving him the return. See Iowa Code Sections 422.20, 422.72. The hearing officer refused Maurice's request to require the department to give him the return. Instead the hearing officer gave Maurice a subpoena which would have allowed him to subpoena the return. Maurice apparently failed to use the subpoena.

Maurice contends the hearing officer abused her discretion when she refused to require the department to give him LaVonne's 1982 tax return. This refusal, Maurice argues, shifted the burden of proof to the department to show (1) that LaVonne had claimed her children as dependents on her

1982 return, (2) that she supported them, and (3) that she had used a standard deduction on the return.

The short answer here is that Maurice already had the information he thought the department should have given him. In paragraph three of his protest Maurice alleged that LaVonne had filed a 1982 income tax return with a filing status "married filing separate returns." He also alleged that she had claimed the standard deduction. Finally, he alleged that the return was attached, marked as Exhibit "B", and made a part of the paragraph by reference. In its answer the department admitted paragraph three in its entirety.

So it was uncontroverted that LaVonne had claimed her children as dependents and that she had used the standard deduction. In these circumstances we fail to see how the hearing officer abused her discretion as Maurice contends.

B. The dependency exemption issue. Iowa Code section 422.12(1)(c), Iowa's dependency exemption provision, provides in pertinent part:

There shall be deducted from but not to exceed the tax, after the same shall be computed as provided in this division the following:

1. a personal exemption credit in the following amounts:

c. For each dependent, an additional ten dollars. As used in this section, the term "dependent" shall have the same meaning as provided by the Internal Revenue Code of 1954.

The term "dependent" was defined in section 152 of the Internal Revenue Code of 1954 as any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer . . . .

(2) a stepson or stepdaughter of the taxpayer.

The hearing officer as well as the district court used these provisions in resolving the dependency exemption issue.

Maurice contends that the special support test in section 152(e)(i) and 2(B)(i) of the Internal Revenue Code of 1954 applies to him rather than the provisions the department and the district court used. Under this test, a taxpayer who contributes $1200 or more for the support of a child is treated as having contributed over one-half of the child's support.

We agree with the department that Maurice cannot use this special support test but, instead, is bound by the more than fifty percent test in section 152 of the 1954 Internal Revenue Code. We reach this conclusion for two reasons. First, Maurice never urged use of the special support test in the proceedings before the agency or in the district court. We do not consider issues raised for the

first time on appeal. See Bonds v. State, 447 N.W.2d 135, 136 (Iowa 1989).

Second, the special support test does not apply. Section 152(e)(i) specifically applies to a "child [who] receives over half of his support during the calendar year from his parents who are divorced or legally separated under a decree of divorcee or separate maintenance, or who are separated under a written separation agreement." (Emphasis added.) The hearing officer found that Maurice and LaVonne were not legally separated under a decree of divorce or separate maintenance. Maurice did not challenge this finding. Nor did he produce any evidence to the contrary. So we conclude there is substantial evidence to support this finding.

Our next inquiry is whether there was substantial evidence to support the hearing officer's finding that Maurice failed to prove he contributed more than fifty percent for the support of each child in 1982. In support of this finding the hearing officer explained:

[Maurice] contends he supplied over half of his stepchildren's support in 1982. [Maurice] bases this contention on his records, [LaVonne's] checking account at a credit union for approximately eight months in 1982, and portions of a deposition taken during May 1983, regarding their divorce. This evidence is insufficient to establish all [LaVonne's] income and expenditures in 1982. [Maurice] did not know if [LaVonne] had other accounts, and he was also uncertain as to all of the items and amounts she paid for regarding

support. In addition, although the father of the children did not pay his court-ordered child support it is unknown what other contributions he may have made. Based on this record, it is not possible to determine the percentages of contributions. The divorce deposition is not complete and leaves open the question of what percentage the mother provided and how she can prove it.

[Emphasis added.] We think the hearing officer more than adequately explained why she thought Maurice had failed to prove that he had contributed more than fifty percent of the children's support. We also think there is substantial evidence to support her findings and conclusions. The district court correctly affirmed this part of the agency's decision.As he did with respect to the dependency exemption issue, Maurice contends the burden of proof shifted to the department to prove the total amount of support. He argues that the department should have given him information about the amount of support LaVonne did provide for the children. The department responds by asserting it could not furnish such information because tax confidentiality statutes prohibited it from doing so. See Iowa Code Sections 422.20, 422.72.

Whether the confidentiality statutes prohibited the department from furnishing the information is a question we need not answer. The department offered Maurice an opportunity to subpoena LaVonne and any pertinent documents he felt were necessary to support his case. Maurice ignored the offer. In these circumstances we are not prepared

to consider sanctioning the department by shifting the burden of proof to it.

On the other hand, given the usually strained relations between ex-spouses, we recognize the difficulty a noncustodial parent may have in using the subpoena approach to prove a case of support. Perhaps in these circumstances the legislature ought to impose an obligation upon the custodial parent to furnish the department with proof of total support and permit the department to furnish that information to the noncustodial parent. See Note, Children of Dissolved Marriages: A Disputed Tax Deduction, 4 Sw. U.L. Rev. 101, 102 (1972). Cf. I.R.C. Section 152(3).

C. The constitutional issues. We last address Maurice's challenge to Iowa Code section 422.9(4) on equal protection grounds under the federal and Iowa constitutions. See U.S. Const., amends. 5 and 14; Iowa Const., Art. I, Section 9. He challenges the statute facially and as applied to him.

Maurice's argument is simply this. His statistical evidence tends to show that men earn more on the average than women, as is true in his case. So it is not surprising that men, according to department records, tend to use the itemized deduction option more than women. The evil that section 422.9(4) causes is that the statute produces an arbitrary result to the damage of the taxpayers who need the deductions the most. In short, Maurice argues that section 422.9(4) results in unconstitutionally unequal treatment of

married men taxpayers versus married women taxpayers.

Generally, a statute that does not offend against equal protection guarantees in the federal constitution does not offend against a similar provision in our State constitution. See Dickinson v. Porter, 240 Iowa 393, 400, 35 N.W.2d 66, 71-72 (1949); Accord Heritage Cablevision v. Board of Supervisors, 436 N.W.2d 37, 38 (Iowa 1989). Maurice gives no reasons or arguments to depart from this general rule, so our analysis here is the same under both constitutions.
No suspect classification or fundamental right is involved here, so our standard of review is rationality. Under this standard we must sustain the validity of a statute "if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." Heritage, 436 N.W.2d at 38.

We recognize that the rational basis standard is easily met in challenges to tax statutes. That is because

in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

Id. at 38-39 (quoting Madden v. Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590, 593 (1940)).

Maurice's burden is a heavy one. He must demonstrate beyond a reasonable doubt that the statute violates equal protection guarantees. To sustain this burden, he has to negate every reasonable basis that may support the statute. In deciding whether Maurice has carried this burden we must keep in mind that "[a]n iron rule of equal taxation is neither attainable nor necessary." City of Waterloo v. Selden, 251 N.W.2d 506, 508-09 (Iowa 1977).

We agree with the department that Maurice has not carried his burden. We reach this conclusion for two reasons. First, as the department argues, section 422.9(4) creates no classification of married men taxpayers versus married women taxpayers. Instead the statute treats married persons as one economic unit for purposes of the deduction. The legislature could have rationally believed that the economics of marriage justified such treatment.

Second, as the department correctly notes, section 422.9(4) serves a legitimate state purpose. Without such a provision, married taxpayers could double-up on deductions--one spouse taking all the itemized deductions and the other taking the standard deduction. Section 422.9(4) prevents a drain on tax revenues while at the same time

preserving a deduction for each spouse in case of a dispute.

We have considered Maurice's remaining argument: the due process challenge to section 422.9(4). We find that it has no merit and needs no further consideration.

IV. Disposition

In summary, we hold that Iowa Code section 422.9(4) requires both spouses to use the standard deduction if either chooses to do so. Moreover, we find no equal protection violation under either the federal or state constitutions because of such an interpretation. We reverse that part of the district court's judgment that allowed Maurice to itemize his deductions on his 1982 return.

We conclude there was substantial evidence to support the agency's finding that Maurice did not provide more than fifty percent of the support for LaVonne's two children. So we affirm that part of the district court's judgment which upheld the agency's determination on this issue.

REVERSED ON THE APPEAL; AFFIRMED ON THE CROSS-APPEAL.